No. 784

FILED
APR 28 1950
CHARLES ELMORE CROPLEY
CLERK

In the

Supreme Court of the United States

October Term, 1949

C. A. MAHON, *Petitioner,*

vs.

GEORGE BENNETT, Doing Business as GEORGE BENNETT CONSTRUCTION COMPANY, and HARRY BENNETT, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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No. ----------

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

Petitioner prays certiorari to review a judgment of the Court of Appeals for the Eighth Federal Circuit entered February 14, 1950.

OPINIONS BELOW.

The Federal District Court opinion written by Judge Albert L. Reeves (R. 733) was filed December 27, 1948, and is reported in 81 F. Supp. 901; that of the Court of Appeals by Judge Woodrough (R. 762) February 14, 1950, is reported in 180 F. (2) 225.

FEDERAL JURISDICTION.

Petitioner, a citizen and resident of Missouri, brought this suit in the Circuit Court of Jackson County, Missouri, April 4, 1946, against George Bennett and Harry Bennett, citizens and residents of Kansas. The requisite diversity of citizenship and amount involved existing, the Bennetts, by appropriate action, removed the cause to the Federal District Court, Western District of Missouri (R. 1, 7, 9, 763).

JURISDICTION OF SUPREME COURT.

The judgment below was entered February 14, 1950 (R. 780), reversing the District Court's judgment entered December 24, 1948 (R. 742-744). Petition for Rehearing, filed March 1st, 1950 (R. 781), was denied March 8, 1950 (R. 811). March 16, 1950, mandate was stayed pending the filing of this petition (R. 812). Jurisdiction of this court is invoked under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code, effective September 1, 1948.

SUMMARY OF THE MATTER INVOLVED.

Petitioner, C. A. Mahon, plaintiff, invoking the Federal Declaratory Judgment Act, alleged in his complaint that he and defendant (respondent here) George Bennett had entered into an oral contract of joint adventure whereby if Bennett got the award they as partners would perform the contract with Kansas City, Missouri, for collecting and disposing of its garbage; that Bennett was awarded a ten-year contract; but that a few days before the award, he repudiated the joint adventure agreement and, a few hours before the letting, wrongfully coerced

Mahon into signing a written contract of employment with Bennett and to abandon the joint adventure agreement.

The court was asked to find these facts and declare the rights of the parties, including plaintiff's rights as against the defendant Harry Bennett, to whom George afterwards sublet the collection part of the garbage contract. There was also a prayer for an injunction and for an accounting. In the alternative, Mahon, alleging wrongful discharge by George Bennett under the written contract, sought damages against him in the sum of $500,000 (R. 1-8).

The cause has been in court since April, 1946 (R. 8), and has been twice tried. Plaintiff seasonably demanded trial by jury on all issues so triable, and requested the court to try the other issues with the aid of an advisory jury (R. 14-15). The motion was sustained (R. 25-26). On the first trial, the jury, answering two special questions, found no joint adventure and no coercion, but awarded plaintiff $5,000 as damages against George Bennett for wrongful discharge under the written contract (R. 87). The trial court sustained plaintiff's motion for a new trial "on all the issues of the case" (R. 87-89).

At the second trial (R. 682), the jury, answering the special questions, found the issues of joint adventure and coercion in plaintiff's favor (R. 687), and the jury was discharged (R. 688). Defendants moved for an order rejecting the verdict (R. 689-697). Following brief and argument, Judge Reeves handed down a memorandum opinion, in which, after reviewing and expressing his views on the testimony, he accepted the verdict, adopted the findings as his own and gave plaintiff's requested findings of fact and conclusions of law (R. 733-738). He then entered judgment in favor of plaintiff on the issues

of joint adventure and coercion and defined the rights and obligations of the parties (R. 738-744).

On appeal, the Eighth Circuit reversed, holding that this part of the suit was in equity (R. 763, 767), and that the verdict and findings below on the issues of joint adventure and coercion were "clearly erroneous" (R. 779). The cause was remanded to the District Court with directions to dismiss the action as to Harry Bennett, and as to George Bennett except the action for damages (R. 779, 780).

QUESTIONS PRESENTED.

A.

Has a Federal Court of Appeals exceeded its judicial powers under Rule 52 (a) of the Federal Rules of Civil Procedude when, on appeal, it tries the case *de novo*, reverses as "clearly erroneous" the special verdict of an advisory jury and the fact findings and judgment of the trial judge, where the verdict and findings are based on substantial testimony, the evidence was oral, was in sharp conflict and given in open court, and such findings had to include passing on the credibility of the witnesses, weighing the testimony, and choosing between two opposite versions of the truth?

B.

Where plaintiff, invoking the Federal Declaratory Judgment law, asks findings and declarations whether he and defendant by contract became joint adventurers, whether plaintiff was wrongfully coerced by defendant into abandoning that agreement and signing a contract of employment with defendant; and there is a prayer for an injunction and an accounting, are the issues of joint adventure and coercion basically legal entitling

plaintiff [who has seasonably applied therefor under Rule 38 (b)] to a trial by jury of those issues? And where the verdict for plaintiff is supported by substantial testimony but the Court of Appeals rejects and reverses it as "clearly erroneous" under Rule 52 (a), has plaintiff been deprived of his right of trial by jury guaranteed by the Seventh Amendment and as preserved by Rule 38 (a), and Rule 57?

C.

Where in such case the appellate court remands the cause for trial of the undecided issue of plaintiff's alleged wrongful discharge under the written contract, but in its opinion holds that plaintiff was incompetent to perform his duties under that contract and strongly implies that he was rightfully discharged, has plaintiff's cause been pre-judged, and has he been deprived of his Constitutional right under the Seventh Amendment to a trial by a jury; and has he been deprived of his property rights without the due process of law accorded to him by the Fifth Amendment to the Federal Constitution?[1]

SPECIFICATIONS OF ERROR.

The Court of Appeals erred:

(1) In holding that the verdict of the jury and the findings of the trial court were "clearly erroneous" on the issues of joint adventure and coercion.

(2) In holding that the proceeding on these issues was equitable and on appeal governed by Rule 52 (a).

(3) In pre-judging the merits of plaintiff's cause on the issue of wrongful discharge under the written contract.

---

[1] These questions were duly raised in appellee's Petition for Rehearing (R. 781-809).

REASONS FOR GRANTING THE WRIT.

I.

IN REVERSING THE VERDICT OF THE JURY AND THE FINDINGS OF THE TRIAL JUDGE, THE COURT OF APPEALS (1) TRANSCENDED ITS POWERS UNDER RULE 52 (a); (2) ITS DECISION IS IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT AND DECISIONS OF OTHER FEDERAL CIRCUITS CONSTRUING RULE 52 (a); AND (3) IS IN CONFLICT WITH MISSOURI CONTRACT LAW ON JOINT ADVENTURE AND THE MODERN DOCTRINE OF COERCION.

Granting, but not conceding, that this part of the suit is in equity governed on appeal by Rule 52 (a), nevertheless if the decision of the learned Court of Appeals is allowed to stand, then a federal appellate court has the unrestricted power, even though the testimony sharply conflicts, to reverse the verdict and findings of a jury and a trial court, notwithstanding such findings had to include weighing the evidence, passing on the credibility of the witnesses, and choosing between two opposite versions of the truth. And in the end, for all practical purposes, Rule 52 (a) means nothing.

Judge Reeves presided over two long trials. Mahon's affirmance and Bennett's denial of a joint adventure contract between them and of Bennett's wrongful coercion rested on the oral testimony of these two men. Their versions of what occurred were in diametric conflict.[2] On each trial Judge Reeves manifested his belief in Mahon's and his disbelief in Bennett's version of the facts. The Judge rejected the first jury's verdict (R. 114) and accepted that of the second (R. 739). He saw, observed and heard these men on the witness stand.

[2] Notwithstanding the two-volume record the testimony on these two issues is not lengthy. We cannot adequately present the claims of this petition, nor can the court get the full impact of what the Court of Appeals has done without going to some extent into the record. But the task will not be great.

The findings of the jury and of the trial court had to include appraising the weight and value of the testimony of these men and passing on their credibility as witnesses. Four times, in four different ways, the triers of the facts in the District Court found in favor of plaintiff on the sharply controverted issues: (1) the verdict of the jury (R. 607); (2) acceptance and approval of the verdict as correct and adoption of it by the court as his own finding (No. 1, R. 739-740); (3) the written opinion of Judge Reeves, in which he found independently that plaintiff's evidence supported the complaint, that the oral agreement was made, that plaintiff's testimony was positive and that he gave complete details of the agreement, that he was corroborated in his contentions by letters from him to Bennett, and by the testimony of Bennett himself; that at a time when Mahon was entirely in Bennett's power and unable to enlist other capital, Bennett told him he could either accept a job or get nothing and being thus coerced and unfamiliar with his rights, he signed the written contract under this illegal compulsion (R. 733-738); and (4) the giving of seven special fact findings (R. 739-741).

As will be shown, the fact recitals in the opinion of the learned Court of Appeals reject as untrue the plaintiff's evidence, as "clearly erroneous" the fact findings of the jury and the trial judge, based on plaintiff's testimony, and accept and adopt as true and correct the oral testimony of the defendant George Bennett. The learned Court of Appeals tries the case *de novo* and substitutes its own judgment on the credibility of the witnesses and the weight of the evidence for that of the fact finders below.

These recitals also entirely omit significant controlling facts in the record which make the recitals themselves erroneous and without support. *Indeed some of the con-*

trolling recitals are affirmatively contradicted by the record, and others negatively by not being in the record.

CONFLICT WITH CONTROLLING SUPREME COURT DECISIONS AND DECISIONS OF OTHER CIRCUITS

Even in an equity action, a federal appellate court will not try the case *de novo* on disputed facts, will not itself weigh the evidence or reject the trial court's views on the credibility of the witnesses.

In *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 340-342, this Court, in an *equity case*, applying Rule 52(a) to *all* civil cases, legal or equitable, declined to upset fact findings of the trial judge made on conflicting testimony, saying:

> "What the Government asks, in effect, is that we try the case *de novo* on the record, reject nearly all of the findings of the trial court, and substitute contrary findings of our own * * *.
>
> * * * * * * *
>
> "* * * The judgment below is supported by an opinion, prepared with obvious care, which analyzes the evidence and shows the reasons for the findings. To us it appears to represent the considered judgment of an able trial judge, after patient hearing, that the Government's evidence fell short of its allegations—a not uncommon form of litigation casualty, from which the Government is no more immune than others.
>
> * * * * * * *
>
> "Rule 52, Federal Rules of Civil Procedure, provides, among other things:
>
> " 'Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.'
>
> "Findings as to the design, motive and intent with

which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified. The trial court listened to and observed the officers who had made the records from which the Government would draw an inference of guilt and concluded that they bear a different meaning from that for which the Government contends.

"It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as to those by other litigants. * * * While, of course, it would be our duty to correct clear error, even in findings of fact, the Government has failed to establish any greater grievance here than it might have in any case where the evidence would support a conclusion either way but where the trial court has decided it to weigh more heavily for the defendants. *Such a choice between two permissible views of the weight of evidence is not 'clearly erroneous.'* " (Our emphasis.)

In the case at bar, an able and experienced trial judge supplemented the verdict and judgment below by a written opinion prepared with care which analyzed the evidence and showed the reasons for the findings (R. 733-738). Those findings, depending (as presently shown) peculiarly upon the credence given to witnesses by those who saw and heard them and inevitably involving determination whether Mahon's mind and will were overcome when he signed the written contract were the function and the prerogative of the fact finders in the trial court. And the choice of the jury and of the trial judge "between two permissible views of the weight of the evidence * * * were not * * * clearly erroneous" under the ruling of this court in the recent *Yellow Cab Co.* case. See, also, *Walling* v. *General Industries Co.*, 330 U. S. 545, 551; *Adamson* v. *Gilliland*, 242 U. S. 350, 353.

So also, the opinion below is in conflict with a line of decisions in the 1st, 2nd, 3rd, 4th, 5th, 7th and 10th Circuits which hold that findings of a trial judge are final, unassailable and binding on a federal appellate court where (as here) the evidence is in sharp conflict and the findings had to include weighing the testimony, passing on the credibility of witnesses who appeared before him and deciding on the truth or falsity of two opposite versions of the facts. *United States* v. *Aluminum Co. of America,* 2 Cir., L. Hand, J., 148 F. (2d) 416, 433; *Westcott* v. *U. S. F. & G. Co.,* 4 Cir., 158 F. (2d) 20, 23; *Leroux & Co.* v. *Merchants Distilling Corporation,* 7 Cir., 165 F. (2d) 481, 482; *Gates* v. *Woods,* 4 Cir., 169 F. (2d) 440, 443; *Philco Corporation* v. *F. & B. Mfg. Co.,* 7 Cir., 170 F. (2d) 958, 960; *United Brotherhood, etc.,* v. *Sperry,* 10 Cir., 170 F. (2d) 863, 867; *U. S.* v. *Railway Co.,* 10 Cir., 171 F. (2d) 377, 379-380; *Smith* v. *McLane,* 3 Cir., 174 F. (2d) 819, 821; *James* v. *U. S.,* 5 Cir., 175 F. (2d) 769; *Bozarjian* v. *Woods,* 1 Cir., 175 F. (2d) 483; *Woods* v. *Fliss,* 7 Cir., 168 F. (2d) 612, 614.

A fair example of the rulings in other circuits as above cited is in the following excerpt from the opinion of Judge Learned Hand in *United States* v. *Aluminum Co. of America, supra* (148 F. (2d), l. c. 433):

> "* * * It is idle to try to define the meaning of the phrase 'clearly erroneous'; * * *
>
> "* * * However, whatever may be said in favor of reversing a trial judge's findings when he has not seen the witnesses, when he has, and in so far as his findings depend upon whether they spoke the truth, the accepted rule is that they 'must be treated as unassailable.' *Davis* v. *Schwartz,* 155 U. S. 631, 636, 15 S. Ct. 237, 39 L. Ed. 289; *Adamson* v. *Gilliland,* 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356; *Alabama Power Co.* v. *Ickes,* 302 U. S. 464, 477, 58 S. Ct. 300, 82 L. Ed. 374. * * *"

In the next few pages we demonstrate by short analyses of the evidence and the findings of the trial and appellate courts that the latter, exceeding its powers, went beyond the utmost verge in reversing the verdict and the trial court findings and judgment.

ANALYSIS OF THE EVIDENCE AND THE FINDINGS OF THE TRIAL AND APPELLATE COURTS.

Evidence on the Issue of Joint Adventure.[3]

In brief, plaintiff's evidence, oral and written, ran thus: A college man, he was 54 years of age at trial time. He served as chief garbage inspector for Kansas City, Missouri, from November, 1940, to November, 1941, and as building manager of the City Hall from 1941 until 1945 (R. 147-148). He had accumulated a modest fortune of approximately $50,000 (R. 323-324).

The Sanitary Service garbage contract with the city was to expire July 15, 1945 (R. 149). Shortly after entering the city's employ as chief garbage inspector, Mahon became interested in the business and determined that some day he would be in the garbage business for himself. During the next four years he applied himself faithfully to learning all he could about garbage collection and disposal. He studied every detail. He investigated the business in other cities. He studied costs, immunization and hog mortality. He was preparing himself to be useful to someone with capital to go in with him in the event a successful bid could be made on the expiration of the existing garbage contract (R. 150-154). In October, 1944, Mahon mentioned his ambition and plan to his friend and lawyer, Mr. Clyde Linde, who was also Bennett's lawyer (R. 155). A few days later Linde and Mahon met with George Ben-

[3] While the Court of Appeals did not expressly reverse the verdict and findings in the trial court on this issue, the recitals in the opinion were the equivalent of a reversal.

nett at the latter's office in Kansas City, Kansas (R. 156). They spent the afternoon there (R. 157). Mahon outlined the garbage collection and disposal business and asked Bennett whether he would be interested in going into it if the opportunity offered. Bennett was interested and so expressed himself (R. 158-159). At the meeting Mahon outlined a proposed agreement between them to this effect: He would operate the business for one-half of the profits with no salary of any sort. He estimated it would take an initial capital contribution of about $160,000, $10,000 of which Mahon was willing to put up if Bennett would provide the balance. The money put up as capital would be retired in proportion to their contributions (R. 158-159). Bennett asked Mahon to keep in close touch with him (R. 160). Within a week they had come to an accord orally on the terms above outlined. Bennett insisted that only he and Mahon should be in the enterprise, exacting the latter's promise [which was kept] not to seek other capital (R. 160-161). Sometime before December 11, 1944, Bennett asked Mahon to address a letter to him [Bennett] outlining what they had agreed on and what they might count on in the way of costs, operating conditions, profits, etc. (R. 162). Mahon wrote that letter on December 11, 1944. Following its receipt, they discussed it together (R. 163). In the letter [Plffs. Exh. 1, R. 172, 173-177] Mahon not only outlined several plans for making a bid, *but recited the substance of their agreement with each other.* In part he said (R. 177):

> "Dear Mr. Bennett:
>
> * * * * * * *
>
> I have been working on some figures in an effort to arrive at a basis for making our bid on the garbage contract; * * *. As I think we should try to at least safely break even on our hauling cost, I am estimating our profit possibilities on our hog feeding as

follows: * * *. Since our profit possibilities can vary so greatly, and on five cent hogs we will just about get our invested capital back whole, it would seem advisable to step up the amortization figure of $16,000 on good years such as is pictured with twelve cent hogs to possibly 50 per cent, which would return you $75,000, and me $5,000 on our invested capital. We could then split the remainder of the net profits, which would then amount to $101,000, and would allow each of us $50,500, in such good years * * *."

Shortly after the letter was sent, he and Bennett read it through together in Bennett's office and when those portions outlining the terms of their agreement were read, Bennett made no objection, indicating that "that was all right with him" (R. 168).

Bennett himself testified that he asked Mahon to write the letter, admitted receiving it (R. 439) and discussing its contents with Mahon in Bennett's office (R. 470-471).[4] Mahon signed the letter. Bennett did not, but on the first page in Bennett's handwriting are these words: "These figures submitted by C. A. Mahon for bidding purposes" (R. 173).

January 17, 1945, Mahon addressed another letter to Bennett (Plffs. Exh. 2, R. 184-187), outlining several alternative bid proposals and estimating results and profits. Throughout this letter he uses the pronouns "we," "our" and "us," and the letter concluded (Plffs. Exh. 2, R. 187):

"We could then cover collections and disposal and depreciation and return of original invested capital on a basis of planning to us about $350,000.00 per year, and feel assured that the balance would be profit for the full ten year period. This would give

[4] Bennett further testified that in reading over the letter together they discussed all parts except those outlining the contract between them (R. 470-471).

> us $140,000.00 per year to split or an almost assured income of $70,000.00 per year plus return of all of our invested capital."

Bennett denied receiving this letter (R. 472-473), but Judge Reeves in his opinion found that he did (R. 734-735).

For five months between October, 1944, and March, 1945, Mahon was in contact personally or by telephone almost daily with Bennett, his engineers and his organization, discussing and working on plans for bidding the contract if the opportunity offered (R. 170-171). During this period Mahon, faithful to his promise, refrained from seeking other capital (R. 180).

Bennett on Joint Adventure

Bennett testified that Mr. Linde, pursuant to arrangement, brought Mahon to Bennett's office November 4, 1944 (R. 427-428); that they all visited together for about an hour. Mahon said the present contract was about to expire. He gave Bennett some information about it; "that was practically all that occurred * * *" (R. 428). Mahon was at Bennett's office on several occasions after that, once or twice a week, Mahon was getting more information and would keep Bennett posted (R. 429). When he saw Mahon again early in December the latter said he had a lot of figures that would be interesting. Bennett then suggested that Mahon get them in writing, "So on the 10th or 11th he sent me a letter with some figures on it" (R. 429).

That before Bennett got this letter Mahon outlined a proposition whereby he would put in some money and "I would put in some. We would form a partnership. He said he could raise about $10,000 if I could raise $150,000 or $160,000, and I wasn't interested in that at all * * *. I told him I wouldn't be interested in his figures like that or any kind of a proposition like that; that I had had a

partner for 18 years and didn't want any more" (R. 429-430).

> "Q. In other words, from and after the first time he made this proposition to you, you turned it down, didn't you? A. That's right.
>
> Q. And he thoroughly understood from what you said to him that you wouldn't go in with him on any such basis or with anybody else, didn't he? A. I take it that he did.
>
> Q. And you made it clear enough to him, didn't you? A. I tried to" (R. 470).

Bennett then gave these conflicting versions of his contract talks with Mahon: Before I got the letter Mahon proposed the partnership (R. 429). The only time I ever discussed this matter with him was after I got the letter of December 11th (R. 470). The only time he ever made this suggestion to me was in the letter and afterwards, and then a few days before March 12, 1945. Never before March 12, 1945, the day we signed the written contract, did Mahon ever claim to me orally that we were in this enterprise together. He made no such claim to me on March 3rd when I offered him employment. Mahon never claimed to me on any other occasion, either before or after he wrote the letter of December 11th, that he and I were in this proposition together (R. 473-476).

The Verdict, Findings and Opinion of the Trial Court.

The advisory jury found that in the fall or winter of 1944 Mahon and George Bennett entered into an oral contract by which it was agreed that if Bennett was awarded the garbage contract they would go in together in performing the contract, Bennett to do the principal financing and Mahon to contribute $10,000 toward the enterprise, that the profits from the operation would be split equally

between them, that Mahon would manage the business without other compensation to him (R. 687).

In his written opinion (not mentioned in Judge Woodrough's opinion) Judge Reeves made independent fact findings in his own language, which in themselves were findings recognized as proper in the amendment to Rule 52(a). See *Skelly Oil Co.* v. *Holloway,* 8 Cir., 171 F. (2d) 670, 672-673. In part, Judge Reeves said (R. 734-735):

> "Plaintiff had gone in quest of capital to finance such a contract and through an intermediary met the defendant, George Bennett. Immediately Mr. Bennett evinced an interest. Further negotiations ripened into an agreement to the effect that George Bennett would advance $150,000, the plaintiff would advance $10,000, and this aggregate of $160,000 was deemed adequate for a working capital. The plaintiff, on his part, agreed to manage and operate the entire business under the contract including the feeding of the hogs, and for his contribution to capital and for his services the profits would be divided equally, with amounts to be set aside from time to time to amortize or discharge the capital contribution.
>
> "Plaintiff's evidence supported the complaint; an oral contract of joint adventure or partnership was consummated on or about the 12th of November, 1944. Immediately thereafter the parties began working out the details for a bid to be submitted by or through George Bennett, when invited to do so by the City. The plaintiff began planning the details of operations under the contract, if same should be awarded on the bid thus to be submitted.
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> • • • • • • •
>
> "Although strenuously denied by defendant, George Bennett that such a contract was ever agreed upon between him and the plaintiff, yet the plaintiff's testimony was positive with respect to the oral agreement and he gave complete details of the claimed joint adventure arrangement consummated between him

and the defendant George Bennett, on or about November 12, 1944. The plaintiff was corroborated in his contention by letters written by him to the said defendant between the making of the agreement and its alleged repudiation by the said defendant on March 3, 1945.

"Plaintiff said that, relying upon the agreement, he had discontinued his efforts to assemble capital or to arrange to bid for the garbage contract."

Passing on the credibility of the testimony of the two men, Judge Reeves continued (R. 735):

"* * * Again, he [Mahon] is supported in his contention by the defendant's testimony as to the conversation had between them on March 3, 1945.

"It may be properly inferred from the testimony of the defendant that there had been an agreement between the parties and that the defendant then emphasized that he would not carry out a partnership agreement with plaintiff but that he would give the plaintiff employment at a substantial wage or salary, and that in addition he would permit him to participate to a limited extent in the profits of the enterprise. His counterproposal at the time would indicate that he was endeavoring to get rid of a prior agreement."

Opinion of the Court of Appeals on Joint Adventure.

Treating the issues, joint adventure and coercion as equitable and review "governed by the Rules applicable to appeals in equity" and "recognizing that we should sustain the finding(s) unless * * * clearly erroneous," the opinion proceeds to these astonishing findings and conclusions:

Mahon testified "that he wanted to get a position to manage the operations under such a (garbage) contract" (R. 769).

Nowhere in the record did Mahon testify that he wanted to get "a position". His testimony was that he was looking for a partner.

> "It is clear from the evidence that Bennett could not and did not make up his mind what he was going to do about bidding on or contracting with the City until he got the completed specifications, which was in February of 1945 (R. 770). As soon as he had the completed specifications, Bennett told Mahon what he would agree to do in the matter of assisting him in the enterprise" (R. 771).

These statements were from Bennett's direct examination (R. 430, 433).

> Mahon testified that the oral agreement after made was "mutually abandoned" and that afterwards a new or modified oral agreement was entered into "by the terms of which Bennett agreed to invest all the money 'necessary' ". That Mahon did not specify what caused the "abandonment" (R. 771).

Mahon's testimony was that sometime in January it became apparent that $160,000 would probably not finance the enterprise. He offered to put up $20,000 or go out and raise additional capital elsewhere. Bennett said he would see his banker. A few days later, he advised Mahon that their financial situation was solved, that he had contacted the banker, who had agreed to loan them all the money they needed at 3 per cent (R. 179-180). Mahon wanted to be sure that the new situation would in no way affect their original agreement and he asked Bennett whether it would. Bennett assured him it would not, saying, "We will have to pay the money back and have to pay 3 per cent interest on it but the original agreement stands just as it was made" (R. 180). Mahon had

more than $20,000 in liquid securities at that time which he could put up (R. 180).

> "While Mahon testified freely about the contract, his difficulty was to define what he claimed it was agreed either of the partners was to do" (R. 772).

Mahon's testimony, his letters and the fact findings below were not vague. He was to contribute $10,000 initially, was to devote all of his time to the enterprise, Bennett was to contribute initially the rest of the capital, their contributions were to be returned to them proportionately, they were to divide the profits equally and Mahon was to receive no other compensation for having brought the opportunity to Bennett and for his services throughout the garbage contract.

If this statement of the learned Court of Appeals rules or implies that the agreement was too indefinite, it is in direct conflict with the Missouri law.

In *Denny* v. *Guyton,* 327 Mo. 1030, 1056, 40 S. W. (2d) 562, 572, the Missouri Supreme Court in its most important ruling on the subject, said of contracts of joint adventure:

> "* * * But it may be said of the great majority of such agreements that they do not point out precisely what each party is to do under them. [Citing cases.] And the contract is not avoided for indefiniteness because the minor details are not fully established. [Citing cases.] * * * Such an agreement may be implied."

In *Neville* v. *D'Oench,* 327 Mo. 34, 59-60, 34 S. W. (2d) 491, the Missouri Supreme Court said:

> "It is the settled law that a contract of joint adventure, or of partnership, need not be established by

showing an express agreement of the parties, that such a contract may be implied and inferred, in whole, or in part, from the acts and conduct of the parties. * * *"

Judge Woodrough's opinion proceeds (R. 773):

"But it is clear from Mahon's testimony that he carried on all the negotiations he had with Bennett about the garbage collection and disposal in the expectation of arriving at an agreement in writing. He so testified and he fully understood that in view of the large amounts involved, the length of time the work was to go on, its many complications, and the extraordinary kind of agreement he was seeking, a writing would be required in order to define the undertakings of the parties. He never even attempted to formulate such a writing, much less to submit one to Bennett before the third day of March, 1945, when the final specifications of the city for the first time disclosed what the work was on which the city called for bids. Mahon's claim that Bennett orally agreed upon any contract between them prior to that time rests solely on his testimony and it is not corroborated or supported by any other witness or any unequivocal fact or circumstance found in the record."

Nowhere in the record did Mahon testify that he negotiated with Bennett "in the expectation of arriving at an agreement in writing"; or that he fully understood that a "writing" would be required in order to define the undertakings of the parties. The statement that Mahon never attempted to formulate "such a writing" prior to March 3, 1945, is in conflict with the record and the testimony of both Mahon and Bennett, as has already been shown. And the recital that the contract of joint adventure rested solely on Mahon's uncorroborated testimony

and was not supported by any other witness or any fact or circumstance is incorrect. But even if correct, it presents no ground for the reversing action of the Court of Appeals. If Mahon's testimony was uncorroborated, so was Bennett's. Moreover, Judge Reeves found that Mahon's testimony was corroborated by his letters and by the testimony of Bennett himself (R. 734-735).

The appellate opinion then proceeds (R. 778):

> "* * * He [Mahon] knew that his claimed oral contract was strange and improbable, and that it rested solely on his uncorroborated word against Bennett's."

In this part of the opinion, the learned judge again entered the jury box, substituting his judgment for that of the jury and the trial court on the weight and value of the evidence and the credibility of the witnesses. And in so doing he wrote 52(a) out of the Federal Rules of Procedure.

Much can be said of this last quotation. Contracts are made every day where one man contributes his talents and time against another's capital[5] for an equal division of the profits. Mahon did much more. He brought to Bennett, a contractor living in another state, the opportunity which resulted in his obtaining the garbage contract with Kansas City (Bennett, R. 493). He worked five months with Bennett and his organization giving them the benefit of five years of knowledge acquired from intensive study. At Bennett's request Mahon refrained from seeking other capital.

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[5] Plaintiff's accountant testified that the most money George Bennett had invested at any time was $139,500 (R. 327). At trial time, this investment had been reduced to $42,000 (R. 327).

Other portions of the opinion take the material for its findings from the testimony of Bennett. Thus (R. 773):

> "When on the other hand, we turn to Bennett's testimony we find a clear and credible account of what occurred between him and Mahon."

It is then recited that Bennett could do nothing concrete about an agreement with Mahon until the specifications came out (R. 774), and that Bennett

> "* * * never gave a thought to making any contract about it with Mahon, and did not make any such contract" (R. 774). Not until the specifications had been submitted by the City did he discuss the contract with Mahon or make * * * "his [Bennett's] offer of the terms upon which he would associate Mahon in the enterprise * * *" (R. 774).

These statements also are taken from Bennett's direct examination (R. 430, 431).

Evidence on the Issue of Coercion.

Mahon testified that between November, 1944, and March, 1945, he, trusting Bennett fully, worked with him and his organization in preparing to make the bid. Complying with Bennett's request, he sought no other capital (R. 150-154, 155, 156, 157, 158, 159, 160-161, 162, 163, 180). The day and hour for submitting bids had been fixed by Kansas City at 2:00 P. M., March 12, 1945. Nine days before that, March 3, 1945, Bennett called Mahon to the former's Kansas City, Kansas, office and bluntly told him that he was not going forward with their agreement. There would be no partnership. No equal division of the profits. He would give Mahon a job at $600 a month and 10% of the profits, that was all. Mahon protested. Bennett's reply was that he was going to bid the contract

for himself if Mahon did not accept Bennett's proposition, and Mahon would be out of the garbage business. Mahon was stunned. He didn't know what to do. During the ensuing week, he attempted without success to obtain capital elsewhere. It was too late. Several times during the week he returned to Bennett's office presenting different propositions, offering to reduce his percentage. To all of these overtures Bennett was adamant. Mahon's last appeal was for 15% on Saturday, the 10th (R. 181-182).

Sunday, March 11th, Mahon called at Mr. Linde's office, telling him what Bennett had done (R. 182). Linde advised that the best thing to do would be to accept Bennett's offer, but to get it in writing. Mahon then asked Linde to prepare a contract. Linde demurred, saying he was representing both of them. But Linde sketched out on a piece of paper a form of contract of employment embracing Bennett's terms (R. 183). Linde's pencil sketch is in the record [Plff's Exh. 3, R. 190, 191-193].

From the sketch Mahon typed out a form of contract between Bennett and him tracking Linde's memorandum. The next morning, Monday, March 12th, he went to Bennett's office, arriving between ten and eleven (R. 195-196). This was the last day and 2:00 P. M. on that day was the last hour when bids would be received (R. 196). Mahon renewed his protests, but Bennett declined to vary in any respect his proposition of March 3rd, saying that was all he would do and that if Mahon did not accept that he, Bennett, was planning "to go ahead that afternoon to bid the contract on his own, and that I would be out" (R. 196). Mahon then presented the written contract to Bennett. Bennett read it, saying, "Clarence, that is what I told you I will do and that is what I will do" (R. 197). They then signed the March 12, 1945, contract (R. 197, Plaintiff's Exhibit 4, R. 198-199).

This agreement was signed at 11:00 o'clock on Monday morning, March 12th, about three hours before the bids were to be submitted (R. 197). Mahon testified that he believed Bennett would carry out his threat and that if he, Mahon, did not sign the written contract, all his efforts of these five years would be lost and gone (R. 203).

Bennett put in his bid just before 2:00 o'clock on March 12 (R. 197). He was the only bidder and was awarded the contract (R. 199). The award to Bennett was confirmed by the Council April 3, 1945 (R. 417). Mahon resigned his employment with the city March 31, 1945, and began working for Mr. Bennett April 3, 1945 (R. 201). August 31, 1945 (R. 203), Bennett discharged him (R. 225).

Bennett on Coercion

Mahon came to his office March 3, 1945. He asked Mahon how much he was making. The latter replied $300 a month. Bennett offered to give Mahon a little more than double that, $600 a month and 10% of the net profits. Mahon wasn't satisfied. He expected a little more "and would like to go into partnership on his deal like he stated in his letter. And I said, 'I never did entertain that at all. That was silly in my estimation.' And then he said, 'Well, if that is the best you will do, I will think it over.' * * * That was the first pass I ever made about a contract * * *. The first time I ever approached him about a contract" (R. 433-434).

Mahon said he would be seeing me in a day or two. I saw him the following Saturday or Sunday, the 10th or 11th of March. He wanted 15% and I said no. He left again and didn't come back until the morning of the 12th, when he had this contract that he signed. He and I agreed to it and I signed (R. 435). On this March 3, 1945, I told Mahon what I would do and all I would do (R. 479); and that if Mahon did not agree to my terms he would be

out, that if my proposition was not accepted I was going to bid the thing for myself (R. 479-480).

The Jury and Judge Reeves on Coercion.

Judge Reeves accepted the verdict (R. 687) on coercion, approved it and adopted it as the court's own finding [No. 1 (b), (R. 740)]. He also gave Finding 7 (R. 741), which is as follows:

> "7. In April, 1945, plaintiff entered the employ of defendant George Bennett under the March 12, 1945, contract, and his employment was terminated on or about August 31, 1945, during which period plaintiff still believed that his only rights in the premises were under the written contract and plaintiff was not advised until shortly prior to the filing of this suit of his rights under the joint adventure agreement with defendant George Bennett, notwithstanding the signing of the March 12, 1945, employment contract."

In his memorandum opinion, Judge Reeves wrote on this subject (R. 735):

> "The plaintiff declined to accept at once the counter-proposal for the reason, as he said, that he was disappointed, nonplussed and confused by the loss of so profitable a contractural arrangement. He protested to the defendant and was then told that he could either accept the proposal then made by the defendant or he would get nothing. According to his testimony he had spent much time and effort on the matter and since the bids were to be submitted within a few days thereafter he felt helpless to protect himself against what he conceived to be a great wrong. Not being familiar with his rights, and under what he claimed was business coercion or duress, he finally agreed to accept the proposal and incorporated such proposal in a written contract."

Opinion of the Court of Appeals on Coercion.

Following its recitals of the evidence on this issue the opinion concludes (R. 779):

> "We are accordingly convinced that the finding that Mahon was coerced into contracting for employment and that he did not so contract of his own free will was clearly erroneous and must be set aside. The finding is not sustained by substantial evidence. * * *"

This conclusion rests on recitals which vary widely from the testimony of both Mahon and Bennett and from the record. Some important examples are:

> "As soon as he had the completed specifications Bennett told Mahon what he would agree to do in the matter of associating him in the enterprise (R. 771). * * * In making the offer [March 3] he set no time limit for its acceptance or rejection (R. 771). * * *
>
> "* * * but our careful search of the records has not disclosed any act or conduct on the part of Bennett from which any coercion, duress or oppression of Mahon can fairly be inferred. * * * (R. 774). Mahon was assured that if he wanted to stand on his alleged oral agreement the subject matter of it was going to be preserved as far as Bennett could do so; Bennett put no time limit on his offer to employ Mahon and Mahon was free to take or leave it as he chose. * * * (R. 774-775).
>
> "* * * It is clear that there was nothing in the situation which existed at the time Bennett made his offer which rendered the timing of it oppressive or unfair * * *" (R. 775).

The recital that Bennett first told Mahon on March 3rd "what he would agree to do" is an all-out accept-

ance of Bennett's testimony. And it rejects plaintiff's proof that they had become joint adventurers back in November, 1944, and that plaintiff, relying on Bennett's agreement, worked with him and his organization for five solid months, at the same time refraining from seeking other capital, and that at the March 3rd meeting Bennett repudiated that agreement, and left Mahon helpless nine days before the letting.

The statement that Mahon was assured that if he wanted to stand on his oral agreement it was going to be preserved for him as far as Bennett could do so, is not only nowhere in the record, but contrary to the testimony of both of these men. It has already been shown that both Bennett and Mahon agree that Bennett's offer on March 3rd and on the morning of March 12th was that Mahon could accept the contract of employment or get nothing.

As to the statements that on March 3rd Bennett set no time limit for Mahon's acceptance or rejection, that Mahon was free to take it or leave it, and that there was nothing at the time which made Bennett's offer or the timing of it oppressive or unfair, the opinion not only disregards all of plaintiff's testimony, but assumes that the coercion is alleged to have occurred on March 3rd and during the period between then and March 12th. The charge in plaintiff's pleading, the verdict of the jury and the findings of the court below were that Mahon's will was overcome by Bennett's threats on the morning of March 12, 1945, when Mahon signed the written agreement three hours before the letting under the compulsion of Bennett's threat that if he did not do so Mahon would be out of the garbage business. A more extreme example of treachery in business by the use of wrongful compulsion could scarcely be shown. Bennett by the law was bound to the observance of the highest degree of good

faith in his dealings with Mahon.[6] He was at Bennett's mercy, entirely in his power. Mahon could not bid. He did not have the money to bid. He had no other capital. He had no other alternative.

The opinion proceeds:

> "Mahon was at Bennett's office when he received the offer to employ him and took it under consideration. He reflected upon it and took advice of his lawyer. It is true, as Mahon knew at the time, that the lawyer had done some work for Bennett as well as for himself, but there is no claim that the lawyer's advice was not honest and disinterested" (R. 775).

The obvious effect on Mahon's mind of Mr. Linde's advice, however honestly given, was to add to the pressure of Bennett's threat. The lawyer representing both of them advising Mahon on March 11th, the day before the letting, to bow to Bennett's treachery and get whatever agreement he could, but get it in writing, foreclosed any freedom of choice if any was left.

THE DECISION OF THE APPELLATE COURT IS IN CONFLICT WITH THE ESTABLISHED MISSOURI CONTRACT LAW ON COERCION

The modern doctrine of duress by business compulsion is firmly rooted in Missouri law.[7] *Mississippi Valley Trust Co.* v. *Begley*, 298 Mo. 684, 694-696, 252 S. W. 76, 78, has this excellent review of Missouri law on the subject:

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[6] *Denny* v. *Guyton*, 327 Mo. 1030, 1092, 40 S. W. (2d) 562, 590; *Feinberg* v. *Milner*, 178 S. W. (2d) 108, 112 (St. Louis Ct. of App.); *Nelson* v. *Abraham*, 29 Calif. (2d) 745, 177 P. (2d) 931, 934; *Spencer* v. *Wilsey*, 300 Ill. App. 439, 71 N. E. (2d) 804, 808; *In re Gotfried*, 45 F. Supp. 939, 941 (S. D. Calif.); C. J. S., Vol. 48, pp. 824-826.

[7] The court's opinion here is in conflict with these Missouri cases: *White* v. *McCoy Land Co.*, 229 Mo. App. 1019, 1039-1040, 87 S. W. (2d) 672 (aff'd. *sub. nom. White* v. *Scarritt*, 341 Mo. 1004, 111 S. W. (2d) 18; *Brown* v. *Worthington*, 162 Mo. App. 508, 516-517, 142 S. W. 1082; *Mississippi Valley Trust Co.* v. *Begley*, 298 Mo. 684, 695-696, 252 S. W. 76, 78.

"I. As To Duress: It now seems well settled that it is sufficient to constitute duress, which will avoid a contract, that one party thereto is prevented from exercising his free will by reason of threats made by the other, and that the contract is obtained by reason of such fact. The test is the state of mind induced by the threats made. The character of the threats is not so material, it being sufficient to constitute legal duress, if they deprive the party purporting to be obligated by the contract of his free moral agency. * * * *Brown* v. *Worthington,* 162 Mo. App. 508 (threat not to deliver drove of hogs purchased, so as to prevent plaintiff from fulfilling contract of resale); *Niedermeyer* v. *Curators,* 61 Mo. App. 654 (threat to refuse admittance of plaintiff as student unless he paid illegal tuition fees); *Fout* v. *Giraldin,* 64 Mo. App. 165 (threat not to satisfy deed of trust unless plaintiff paid more than was due); *Link* v. *Real Estate Co.,* 182 Mo. App. 536 (threat to sell estate under deed of trust after notes had been paid); *Wells* v. *Adams,* 88 Mo. App. 215 (threat to refuse to release mortgage unless illegal demand was paid); *Brewing Co.* v. *St. Louis,* 187 Mo. 367, and *Westlake* v. *St. Louis,* 77 Mo. 47 (threat to turn off water and thereby injure business unless illegal demand was paid); *Simmons Hardware Co.* v. *City of St. Louis,* 192 S. W. 394, and *State ex rel.* v. *Reynolds,* 194 S. W. 878 (threat in each case to refuse license to do business and to prosecute unless illegal demand was paid); *Lappin* v. *Crawford,* 221 Mo. 380 (threat to prevent plaintiffs from obtaining loan already negotiated, unless they paid illegal demand as commission); * * *

"The above cases show that the law in this State is that threats of personal injury or criminal prosecution and imprisonment, as formerly held by the English and some American courts, are no longer required to make out legal duress, but that each case stands on its own heels, and if the obligation in question was incurred by reason of the threatened

> action or conduct of the party obtaining the contract, to expose the other party * * * to serious financial loss or injury of his business or property under distressing circumstances which an ordinary suit at law or equity might be inadequate to remedy, legal duress exists, provided the triers of the fact, whether court or jury, believe that by reason of such threatened action the will of the party entering into the obligation was overcome, and but for such threatened action or conduct he would not have entered into such obligation. And this is the modern rule generally in this country."

The state of Mahon's mind and will when he signed the written contract at 11:00 A. M. on March 12th was a question of fact to be determined by the jury and the trial judge. Applying Missouri law, Judge Johnsen, in *Furman* v. *Gulf Insurance Co.*, 152 F. (2d) 891, 894, said:

> "Whether the free will of a party has been so dominated in a particular transaction as to have controlled his action is ordinarily a question of fact, where it is possible under the evidence for there to have been a wrongful use of coercive means or circumstances. Cf. *White* v. *McCoy Land Co.*, 229 Mo. App. 1019, 1039, 1040, 87 S. W. (2d) 672, 685; *Winget* v. *Rockwood*, 8 Cir., 69 F. (2d) 326, 330."

So also, this court in the late *Yellow Cab* case refused to disturb fact findings of the trial court as to the state of mind and motives of witness-litigants who appeared before it, saying (338 U. S. 338, 341):

> "Findings as to the design, motive and intent with which men act depend peculiarly upon the credit given to witnesses by those who see and hear them. If defendants' witnesses spoke the truth, the findings are admittedly justified."

The opinion of the learned court below also apparently implies that Mahon waived the coercion and duress and ratified the written contract by remaining in Bennett's employ until August, 1945 (R. 766, 776).

Mahon had no other lawyers or advisers than the firm of Langworthy, Matz & Linde, and was never told what his rights were with respect to the joint adventure agreement until December, 1945, or January, 1946, when he consulted his present counsel (R. 204, 205). He stated, as the opinion recognizes (R. 776-777), that until that time he was under the impression he was bound by the written contract (R. 205). He sued April 4, 1946 (R. 8). The trial court made a special finding on this subject (Finding No. 7, R. 741).

There was no evidence in the record that the compulsion under which he signed the written contract was removed during the brief period ending in his being forced out by the Bennetts in August, 1945. And the opinion of the learned court below overlooked and is in conflict with a long line of cases in Missouri and elsewhere which hold that the same fear which prompted Mahon to sign the March 12th contract (the fear of losing everything) was presumed by the law to continue until some intervening fact or circumstance removed that fear or until the lapse of a long length of time from which that could be presumed. See the following cases: *Guardian Trust Co.* v. *Meyer,* 8 Cir., 19 F. (2d) 186, 193; *Bell* v. *Campbell,* 123 Mo. 1, 17, 25 S. W. 359, 363; *Eureka Bank* v. *Bay,* 90 Kan. 506, 135 Pac. 584; *Bray* v. *Haskins,* 229 S. W. 1074, 1078 (Mo. Sup.).

And it must appear that the claimed ratification occurred *after* the removal of the duress. *Bray* v. *Haskins, supra,* 229 S. W. 1074, 1078; 5 Williston, *Contracts* (Rev.

ed., 1937), Sec. 1626. We invite particular attention to Judge Van Valkenburgh's opinion in 19 F. (2d) 186, 193, *supra.*

Moreover, ratification by Rule 8 (c) should have been plead. Failing, this defense under Rule 12 (h) was waived. *Van Sant* v. *American Express Co.,* 3 Cir., 169 F. (2d) 355, 372. Bennett did attempt to plead ratification, but the facts pleaded were legally innocuous (R. 13).

II.

THE ISSUES OF JOINT ADVENTURE AND DURESS WERE BASICALLY LEGAL. THE VERDICT OF THE JURY, UNDENIABLY SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS CONCLUSIVE AND THE COURT OF APPEALS ERRED IN HOLDING THAT ITS REVIEW WAS GOVERNED BY RULE 52 (a), AND REVERSING THE FACT FINDINGS BELOW DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHT UNDER THE SEVENTH AMENDMENT TO A TRIAL BY JURY OF THESE ISSUES.

The opinon characterizes the suit as a combined action in equity and at law (R. 763), assumes that the issues of joint adventure and coercion "were tried by the court in equity" (R. 766) and holds that review on these issues is governed "by the Rules applicable to appeals in equity" (R. 767).

Plaintiff prayed the court "to find, declare and hold" that he and defendant George Bennett had entered into a contract of joint adventure and that plaintiff had been forced to sign the March 12 contract by reason of the wrongful duress and coercive business compulsion of defendant George Bennett (R. 6-7). The court was also asked to find and declare the rights and legal relations between plaintiff and defendant George Bennett (R. 6).

That the primary prayers invoke jurisdiction under the Federal Declaratory Judgment Act is clear. The findings and declarations sought are authorized by Title 28, U. S. C. (1948), §§ 2201 and 2202. Section 2201 provides:

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

The judgment and decree of the trial court found and declared the plaintiff's rights against George Bennett and their legal relations with each other (R. 742-743). No injunction actually issued. The judgment merely was that if Bennett excluded plaintiff from participating in the joint adventure, he would nevertheless be entitled to his share of the profits; and in the event of such exclusion, defendant Bennett "may, on application" be enjoined from such interference with plaintiff's rights (R. 742-743). The accounting issue was entirely separate, was not tried, the judgment and decree being appealed from as final without the accounting.

Rule 38 (b) provides that a party may demand a trial by jury "of any issue triable of right by a jury" by serving notice within 10 days after service of the last pleading. Defendants' answers were filed, respectively, on December 3 and December 9, 1946 (R. 9, 14). December 4, 1946, plaintiff filed his written demand for trial by jury "on all issues so triable" (R. 14).

Rule 57, the Declaratory Judgment Rule, preserves the right of trial by jury as provided in Rules 38 and 39.

Rule 38 (a) preserves inviolate the right of trial by jury as declared by the Seventh Amendment.

Since the adoption of the new Rules, the federal courts have steadily held that where the party's claims embrace issues which are both legal and equitable, that the right of trial by jury of the legal issues is not lost by the presence of equitable issues or claims for equitable relief. It has also uniformly been ruled that a declaratory judgment suit is neither legal nor equitable in its nature, and that where in such a suit equitable remedies are sought in addition to findings and declarations, a Constitutional right of trial by jury of the legal issues still exists. And the test is that if the declarations sought might otherwise be cognizable in an action at law, such issues are essentially legal and triable by a jury.

That plaintiff here had the right to sue at law for damages for breach of the joint adventure agreement is settled by the Missouri decisions, as well as the law elsewhere. *Denny* v. *Guyton*, 327 Mo. 1030, 1094, 40 S. W. (2d) 562, 591. That relief may be sought for duress by an action at law for damages was expressly held by the 8th Circuit in *Furman* v. *Gulf Ins. Co.*, 152 F. (2d) 891, 894, where Judge Johnsen, speaking for that court and quoting from the Restatement, said:

> "• • • As to personal property, relief ordinarily may be sought for duress by an action at law for damages. Restatement, Torts, §871, Comment c."

Plaintiff having a plain and adequate remedy at law on these issues, they were basically legal, were triable as of right by jury, and the verdict was conclusive on the appellate court. *Hargrove* v. *American Central Insurance Co.*, 10 Cir., 125 F. (2d) 225, 228; (*American*) *Lumbermen's Mut. Casualty Co.* v. *Timms and Howard*, 2 Cir.,

108 F. (2d) 497, 499-500; *Pacific Indemnity Co.* v. *McDonald*, 9 Cir., 107 F. (2d) 446, 448-449; *U. S. F. & G. Co.* v. *Koch*, 3 Cir., 102 F. (2d) 288, 291, 295; *Aetna Casualty & Surety Co.* v. *Quarles*, 4 Cir., 92 F. (2d) 321, 325; 3 Moore's, *Federal Practice* (1938 ed.), pp. 3005-3006; Borchard, *Declaratory Judgments* (2nd ed., 1941), pp. 674-676; *Ring* v. *Spina*, 2 Cir., 166 F. (2d) 546, 550.

See, also, *U. S.* v. *Knight*, 336 U. S. 505, 508.

It is true that the issues of joint adventure and coercion were by the trial court submitted to an "advisory" jury and that both the trial court and plaintiff assumed that the verdict was advisory only. But plaintiff clearly demanded a trial by jury on all issues so triable, and a mere misnomer of the jury as "advisory" amounted neither to waiver nor estoppel, and did not change the conclusive effect of the verdict when rendered.

Upon this ground alone, the opinion and judgment of the learned Court of Appeals should be quashed.

III.

THE COURT OF APPEALS EXCEEDED ITS JUDICIAL POWERS IN PRE-JUDGING PLAINTIFF'S CASE UNDER THE WRITTEN CONTRACT; AND IN SO DOING ABRIDGED HIS RIGHT TO DUE PROCESS AND TO A TRIAL BY JURY ACCORDED TO HIM BY THE FIFTH AND SEVENTH AMENDMENTS TO THE FEDERAL CONSTITUTION.

The Court of Appeals remanded the case for trial of the undetermined issue of plaintiff's wrongful discharge under the written contract. But its opinion holds in effect that plaintiff was rightfully discharged. Witness this language (R. 772-773):

> "• • • Mahon testified he was glad to get out of his former job of garbage inspector because he did not like the odor of garbage and his voluminous testimony makes it very clear that in the oral agreement

he said Bennett made with him, there was no understanding as to how close Mahon was to be to the garbage handling or handlers which was the subject matter of their negotiations. Nor did he say who was to decide on that important matter when the work should start. The testimony on the trial covered what occurred at the start of the work and it was shown beyond question that Mahon would not stay at the little office put up adjacent to the garbage scales and the garbage hog feeding lot for directing the work, though there was evidence tending to show that that was necessary. The evidence was convincing that he was not competent to start the work off properly; that uncollected garbage accumulated dangerously in the July heat, and that the whole enterprise was put in jeopardy until Bennett brought in competent and experienced persons who took over and redeemed the situation.[1]

* * * * * * *

[1]Bennett denies, however, that he discharged Mahon. He says that he liked Mahon and that he was always confident that he would find work within the terms of the employment contract for Mahon to do in spite of his manifest incompetency to manage the initial stages of the enterprise."

George Bennett's pleaded defense was that plaintiff "was unable to satisfactorily perform and discharge the services required of him" under the written contract (R. 11). That was his defense on the trial. On the first trial, the jury decided that plaintiff was wrongfully discharged (R. 87). Nevertheless, the Court of Appeals opinion sustains Bennett's defense by saying that the evidence was convincing that plaintiff was not competent and that the whole enterprise was put in jeopardy until Bennett brought in competent and experienced persons who took over and redeemed the situation. And in the footnote the learned court below refers to Mahon's "manifest incompetency to manage the initial stages of the enterprise" (R. 773). The mandate remanded the cause "for further

proceedings on the law action set forth in plaintiff's petition, consistent with the opinion of this court this day filed herein" (R. 780).

On a re-trial of this issue, may defendant Bennett offer this language in evidence? How can plaintiff hope to prove his competency when the Court of Appeals has said that he was incompetent to manage the garbage business?

That it was error for the court to pre-judge this issue has been recently held by this Court in *Fountain* v. *Filson*, 336 U. S. 681. That the Fifth Amendment guarantees to every man the right to be heard before his cause is condemned in court needs no exposition.

> "* * * An essential element of due process is an opportunity to be heard before the reaching of a judgment. By due process of law is meant 'a law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' *Trustees of Dartmouth College* v. *Woodward*, U. S. 1819, 4 Wheat. 518, 581, 4 L. Ed. 629 (Webster's argument). As said in *Galpin* v. *Page*, U. S. 1873, 18 Wall. 350, 368, 21 L. Ed. 959: 'It is a rule as old as the law, and never more to be respected than now, that no one shall be personally bound until he has had his day in court, by which is meant, until he has been duly cited to appear, *and has been afforded an opportunity to be heard.* Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' (Italics supplied) * * *" *L. B. Wilson, Inc.*, v. *Federal Communications Com'n.*, App., D. C., 170 F. (2d) 792, 802.

That this part of the opinion will undoubtedly cripple plaintiff in presenting his case to a new jury, and there-

fore also deprive him of his Constitutional rights under the Seventh Amendment, is equally plain.

For this reason alone, a writ of certiorari should issue.

URGENT NEED FOR CERTIORARI.

The action of the learned Court of Appeals in reversing the verdict, findings and judgment in the trial court raises questions of gravity and importance to the Federal Bench and to the bar all over the nation. The opinion renders innocuous and meaningless Rule 52 (a). It takes away from trial courts and confers upon appellate courts the time-honored prerogatives of the trial judge; and in doing so departs from the practice and disagrees with the opinions of, we believe, all the other federal circuits. In important respects it destroys the functioin of fact findings in court cases. It strikes down the Constitutional right of trial by jury in Federal Declaratory Judgment cases. And, finally, without trial, it pre-judges the merits of a party's claims in a case which it remands to the court below to be tried before a jury. Certiorari should issue here.

Respectfully submitted,

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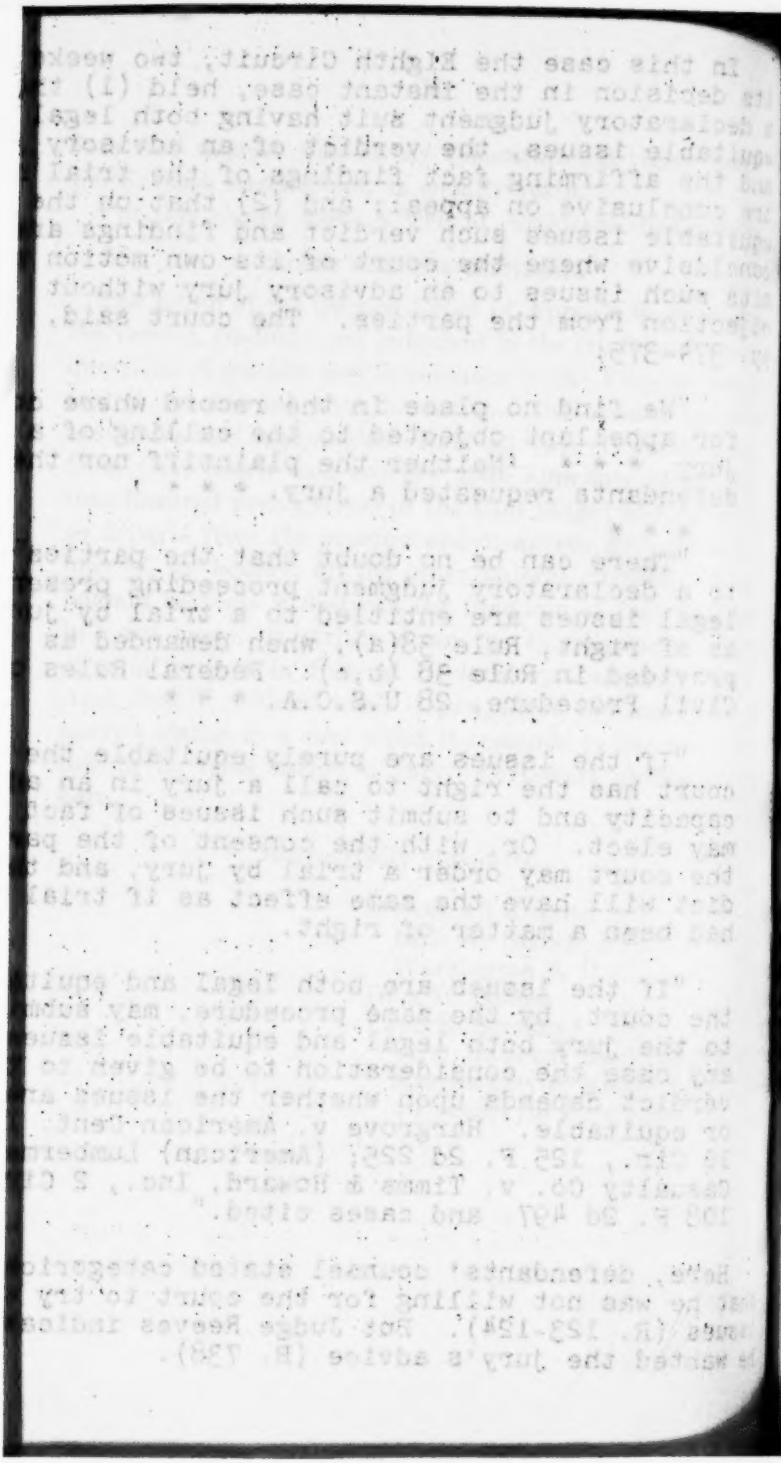
In this case the Eighth Circuit, two weeks after its decision in the instant case, held (1) that in a declaratory judgment suit having both legal and equitable issues, the verdict of an advisory jury and the affirming fact findings of the trial court are conclusive on appeal; and (2) that on the equitable issues such verdict and findings are conclusive where the court of its own motion submits such issues to an advisory jury without objection from the parties. The court said, pp. 374-375:

> "We find no place in the record where counsel for appellant objected to the calling of a jury. * * * 'Neither the plaintiff nor the defendants requested a jury. * * * '
>
> * * *
>
> "There can be no doubt that the parties to a declaratory judgment proceeding presenting legal issues are entitled to a trial by jury as of right, Rule 38(a), when demanded as provided in Rule 38 (b,c). Federal Rules of Civil Procedure, 28 U.S.C.A. * * *
>
> "If the issues are purely equitable the court has the right to call a jury in an advisory capacity and to submit such issues of fact as he may elect. Or, with the consent of the parties, the court may order a trial by jury, and the verdict will have the same effect as if trial by jury had been a matter of right.
>
> "If the issues are both legal and equitable, the court, by the same procedure, may submit to the jury both legal and equitable issues. In any case the consideration to be given to the verdict depends upon whether the issues are legal or equitable. Hargrove v. American Cent. Ins. Co., 10 Cir., 125 F. 2d 225; (American) Lumbermens Mut. Casualty Co. v. Timms & Howard, Inc., 2 Cir., 108 F. 2d 497, and cases cited."

Here, defendants' counsel stated categorically that he was not willing for the court to try these issues (R. 123-124). But Judge Reeves indicated he wanted the jury's advice (R. 738).



October Term, 1949

Office - Supreme Court, U. S.
FILED
JUN 2 1950
CHARLES ELMORE CROPLEY
CLERK

C. A. MAHON, Petitioner,

vs.

EORGE BENNETT, Doing Business as GEORGE BENNETT CONSTRUCTION COMPANY, and HARRY BENNETT, Respondents.

No. 784.

REPLY BRIEF OF PETITIONER.

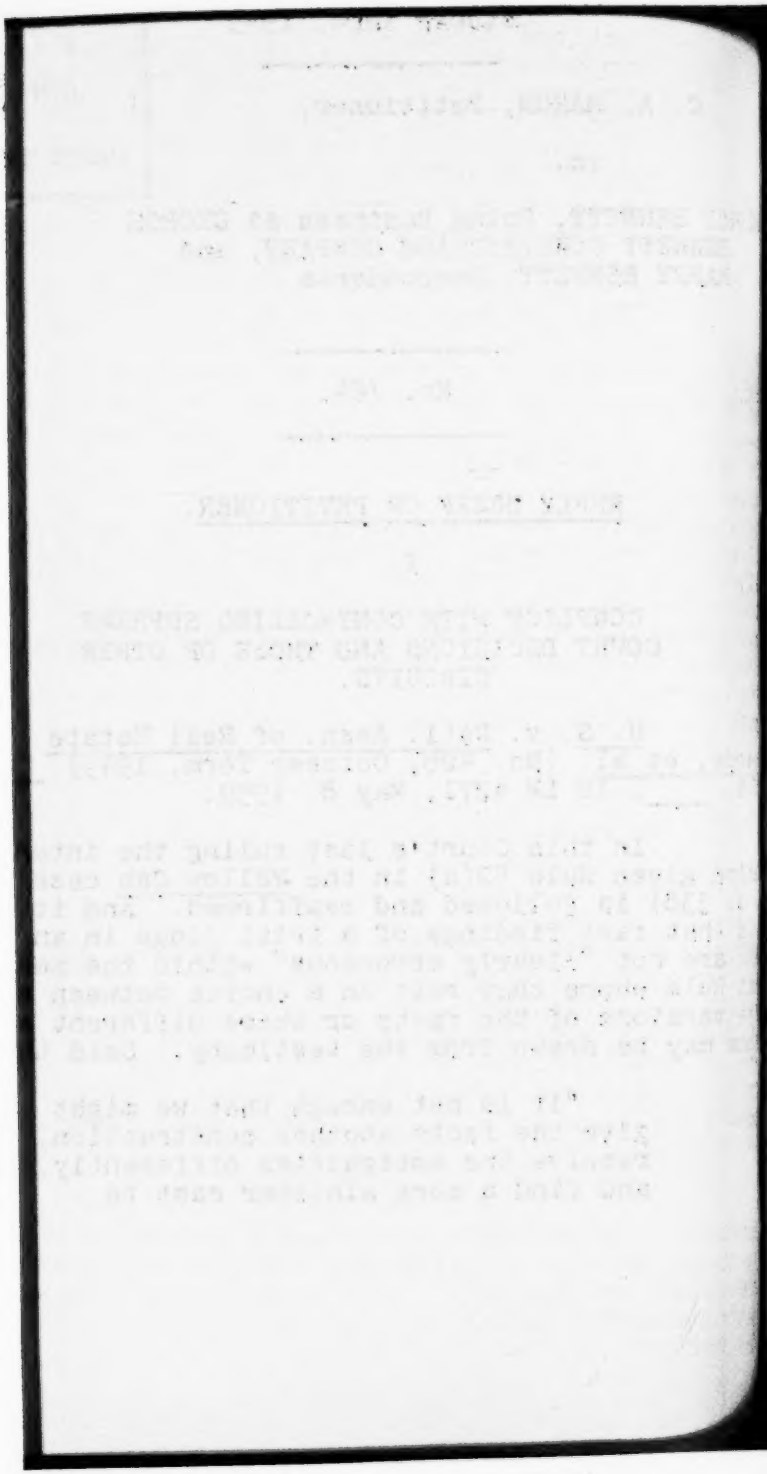
I.

CONFLICT WITH CONTROLLING SUPREME COURT DECISIONS AND THOSE OF OTHER CIRCUITS.

U. S. v. Natl. Assn. of Real Estate oards, et al. (No. 428, October Term, 1949) . S. ____, 18 LW 4271, May 8, 1950.

In this Court's last ruling the interpre- ation given Rule 52(a) in the Yellow Cab case (338 . S. 338) is followed and reaffirmed. And it is again eld that fact findings of a trial judge in an equity ase are not "clearly erroneous" within the meaning of hat Rule where they rest on a choice between two oppo- ite versions of the facts or where different conclu- ions may be drawn from the testimony. Said the Court:

> "It is not enough that we might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to



actions which the District Court apparently deemed innocent. See United States v. Yellow Cab Co., 338 U. S. 338, 342; United States v. Gypsum Co., 333 U. S. 364, 394-395. We are not given those choices, because our mandate is not to set aside findings of fact 'unless clearly erroneous.'"

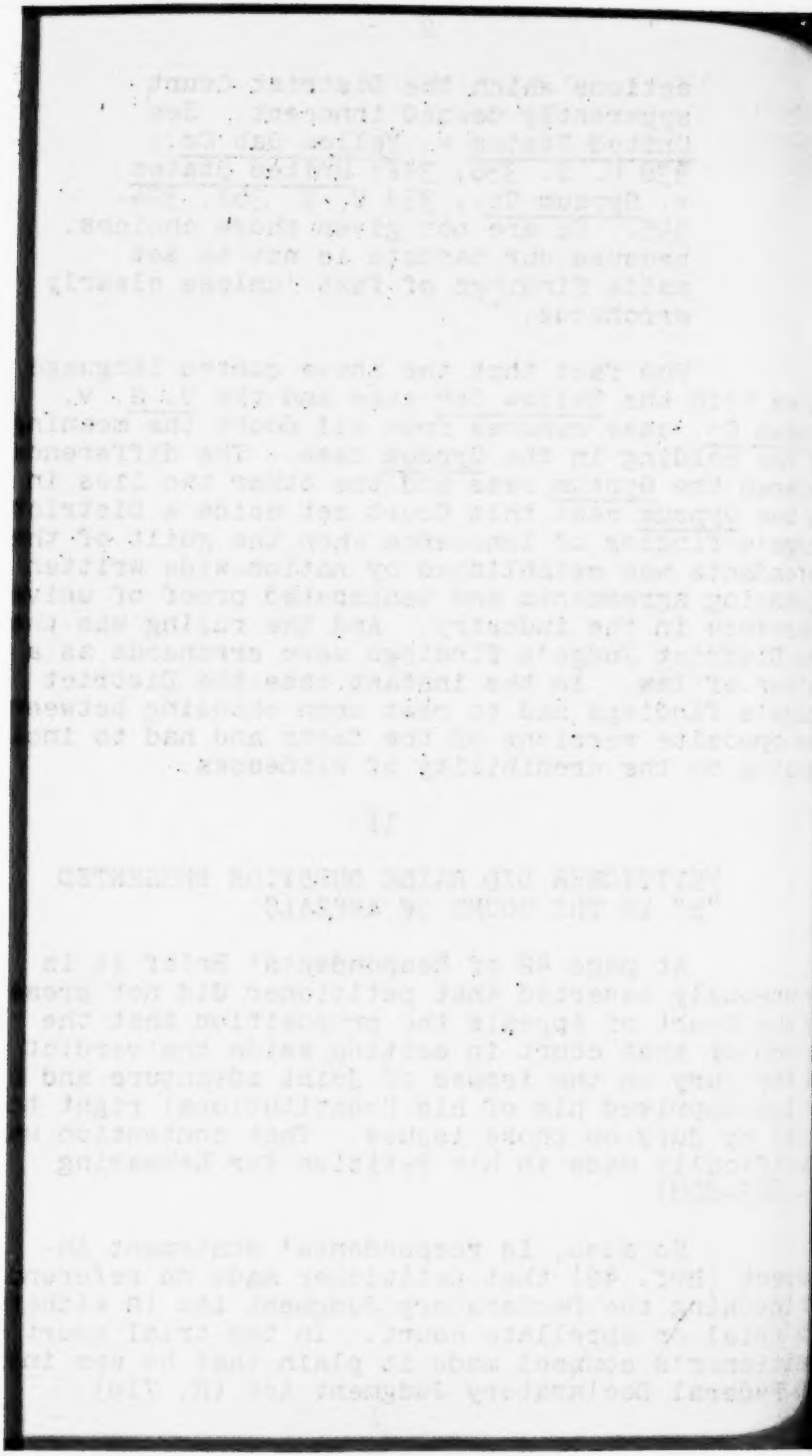
The fact that the above quoted language cites both the Yellow Cab case and the U. S. v. Gypsum Co. case removes from all doubt the meaning of the holding in the Gypsum case. The difference between the Gypsum case and the other two lies in this: In the Gypsum case this Court set aside a District Judge's finding of innocence when the guilt of the defendants was established by nation-wide written licensing agreements and undisputed proof of universal adherence in the industry. And the ruling was that the District Judge's findings were erroneous as a matter of law. In the instant case the District Judge's findings had to rest upon choosing between two opposite versions of the facts and had to include passing on the credibility of witnesses.

II.

PETITIONER DID RAISE QUESTION PRESENTED "B" IN THE COURT OF APPEALS.

At page 42 of Respondents' Brief it is erroneously asserted that petitioner did not present to the Court of Appeals the proposition that the action of that court in setting aside the verdict of the jury on the issues of joint adventure and coercion deprived him of his Constitutional right to a trial by jury on those issues. That contention was specifically made in his Petition for Rehearing (R. 803-808).

So also, is respondents' statement incorrect (Brf. 42) that petitioner made no reference to invoking the Declaratory Judgment Law in either the trial or appellate court. In the trial court petitioner's counsel made it plain that he was invoking the Federal Declaratory Judgment Act (R. 719).



Indeed, in appellants' brief in the Court Appeals opposing appellee's Motion to Dismiss, they treated this part of the suit as invoking the eral Declaratory Judgment Law. They said (p. 1):

" * * * It is the contention of the Appellants that the Judgment and Decree entered in this case is a final judgment from which an appeal may be taken not only under the provisions of the Federal Declaratory Judgment Act (28 U.S.C. Sec. 400; 28 U.S.C.A. Sec. 2201; Supp.), but also under the general provisions of the United States Code (28 U.S.C.A. Sec. 1291; Supp.). * * *

[p.10]

"Under the provisions of the Federal Declaratory Judgment Act, the Judgment and Decree appealed from in this case was and is a final and appealable judgment."

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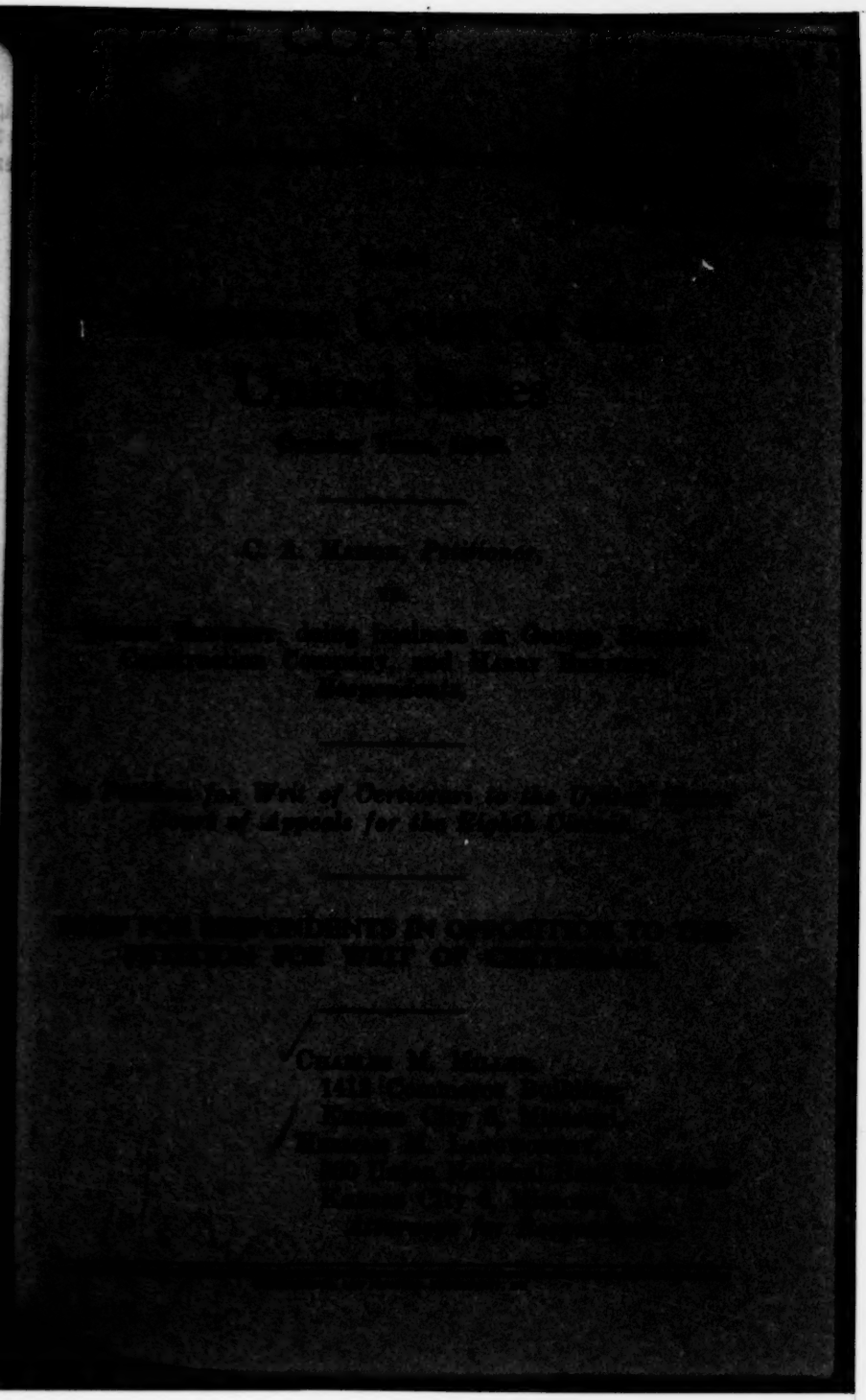

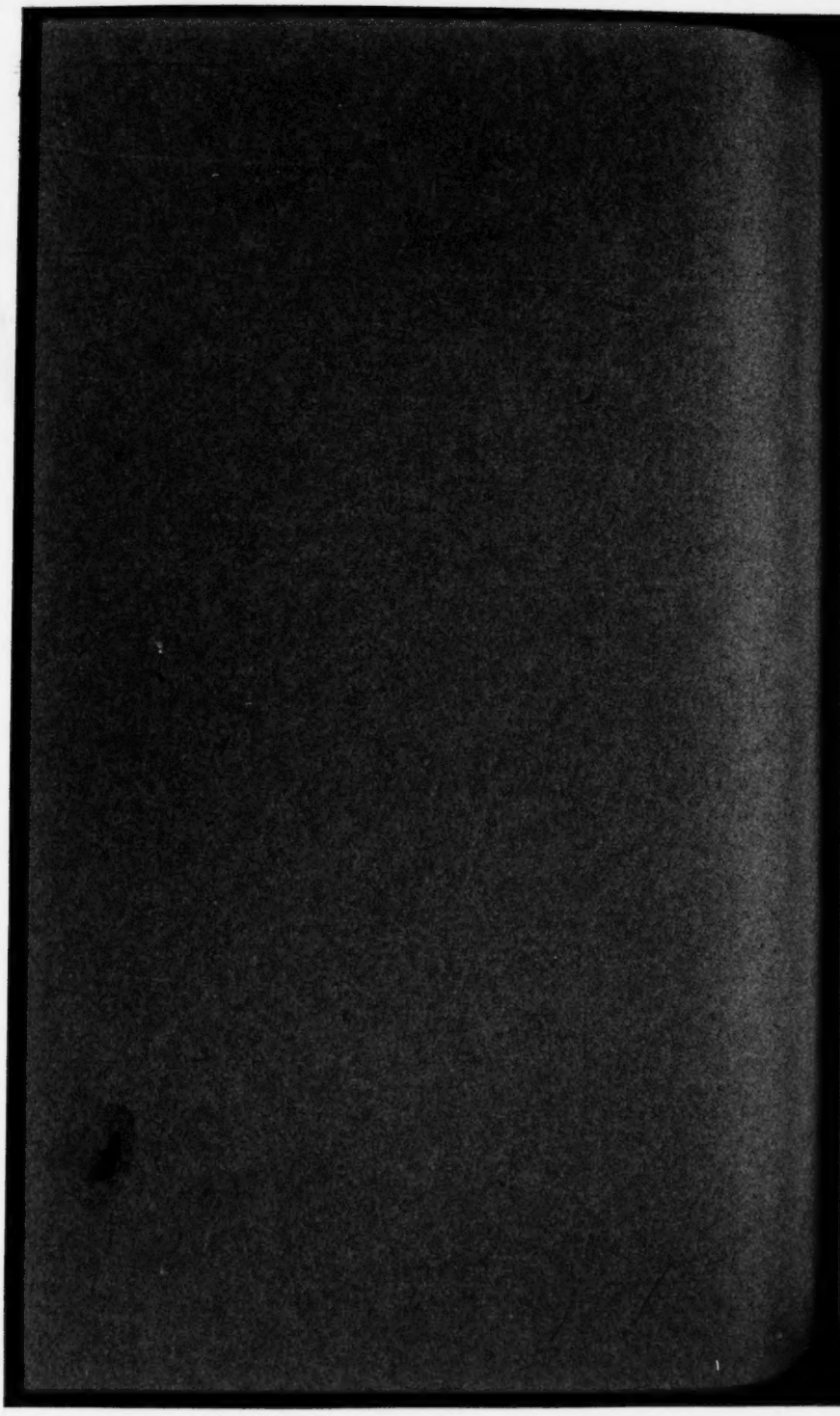

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In the

Supreme Court of the United States

October Term, 1949.

C. A. MAHON, *Petitioner,*

vs.

GEORGE BENNETT, doing business as George Bennett Construction Company, and HARRY BENNETT, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

No. 784.

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

The Petitioner in this action filed his Petition for Writ of Certiorari in this Court, accompanied by the Record in the case, on April 28, 1950; and thereafter on May 2, 1950, Notice of the Filing of the Petition, together with a copy of the Petition, printed Record and supporting brief, were served on Counsel for the Respondents. It is the contention of the Respondents that the Petitioner has not presented, and that the Record in the case does not present, any adequate ground for the granting of the Writ, and the Petition should therefore be denied.

Opinions Below.

The opinion of the District Court of the United States for the Western District of Missouri (R. 733) is reported in 81 Fed. Supp. 901. The opinion of the Court of Appeals for the Eighth Circuit (R. 762) is reported in 180 F. 2d 224.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 14, 1950 (R. 780). A Petition for Rehearing was filed on March 1, 1950 (R. 809), and was denied March 8, 1950 (R. 811). The jurisdiction of this Court is invoked by the Petitioner under Title 28, U. S. C., Sections 1254 and 2101 (c) of the new Judicial Code.

STATEMENT.

There are certain inaccuracies in the Petitioner's statements concerning some of the pertinent facts in the case and the issues involved, and also concerning the precise questions which were decided by the Court of Appeals, and it is therefore necessary for the Respondents to present a short statement of the matters involved.

This action was instituted in the Circuit Court of Jackson County, Missouri, on April 4, 1946 (R. 1), and it was thereafter removed to the United States District Court, Western Division of the Western District of Missouri, on the ground that the Petitioner (Plaintiff in the District Court, and sometimes hereinafter referred to as the "Plaintiff") and the Respondents (Defendants in the District Court, and sometimes hereinafter referred to as the "Defendants") were citizens of different states and that the requisite jurisdictional amount was involved (R. 9).

The Nature of the Action.

The Petition (R. 1-8), which is in one count, presented a combined action in equity and at law in which the plaintiff sought to have the court find, declare, and hold

> (a) that an *oral agreement* of joint adventure or partnership was entered into between the plaintiff and the defendant George Bennett as the result of discussions between them beginning in November, 1944; that a *written contract* dated March 12, 1945, between the plaintiff and defendant George Bennett covering the same subject matter was obtained by said defendant from plaintiff by duress and should be disregarded; that both defendants be enjoined

from interfering with plaintiff's participation in said joint adventure under said alleged oral agreement of joint adventure; and that both defendants be required to account to the plaintiff for all profits derived from the operation of said joint adventure; *or in the alternative*

(b) that plaintiff recover the sum of $500,000.00 in damages from both defendants for the alleged breach of said written contract of March 12, 1945.

The Plaintiff's Claims.

The Petition (R. 1-8) alleges in substance:

That the ten-year contract between Kansas City, Missouri, and Sanitary Service Company for the collection and disposal of garbage in Kansas City, Missouri, was about to expire in July, 1945; that plaintiff had acquired information in respect to the requirements relating to the collection and disposal of garbage; that beginning in November, 1944, and for several months thereafter, plaintiff entered into negotiations with the defendant George Bennett, with the result that an oral agreement was entered into between plaintiff and said Bennett under the terms of which said Bennett was to submit a bid to the City for the collection and disposal of its garbage, if and when the city of Kansas City should advertise for such bids; and if the submitted bid resulted in an award, the plaintiff and said defendant George Bennett would perform the contract with the City under a partnership or joint adventure agreement between them whereby the plaintiff would devote all of his time, efforts and abilities to the management and operation of the collection and disposal business and contribute $10,000.00 in cash towards the capital of the joint adventure, and the defendant George Bennett would make an initial contribution of $150,000.00 in cash toward the capital of the joint ad-

venture and as much more as was necessary, upon the further agreement and understanding that the profits and losses from the operation of the business would be shared equally between the plaintiff and the defendant George Bennett, and upon the further agreement and understanding that the cash capital contributions of plaintiff and defendant George Bennett would be returned to them out of profits in proportion to their respective cash contributions;

That the City advertised for bids to be opened on March 12, 1945; that a bid was submitted by George Bennett; and that said George Bennett was thereafter awarded the contract by Kansas City, Missouri, for the collection and disposal of garbage for the City during the period from July 16, 1945, to April 30, 1955;

That on March 3, 1945, the defendant George Bennett notified plaintiff that he would not go through with said alleged oral agreement of joint adventure, but that if he (Bennett) was awarded the City contract, he would employ plaintiff for the period of the awarded contract at the rate of $600.00 per month and ten per cent of the profits; that plaintiff could accept said offer or be deprived of any participation whatever in the garbage collection and disposal business;

That because of the coercion, duress and business compulsion of the said defendant's threats, the plaintiff thereafter on March 12, 1945, prepared and entered into a written contract with the defendant George Bennett whereby if the garbage contract was awarded to said Bennett, said Bennett would employ the plaintiff as general manager at $600.00 per month and ten per cent of the profits, a copy of said written contract being attached as Exhibit "A";

That in April, 1945, plaintiff began the management and operation of said garbage contract with the City for the defendant George Bennett under said written contract, and proceeded to devote his time and efforts to said enterprise until about August 29, 1945, when the defendant George Bennett without reasonable cause notified the plaintiff that he was no longer connected with the organization, "and thereby wrongfully and without reasonable cause or excuse breached both the oral agreement of joint adventure and the written agreement, into the signing of which the plaintiff had wrongfully been coerced";

That thereafter in September, 1945, an agreement was entered into between defendant Gorge Bennett and defendant Harry Bennett whereby that part of the garbage contract relating to the collection of garbage was sublet to Harry Bennett;

That shortly before the filing of this suit, plaintiff's mind was for the first time removed from the duress of the threats of the defendant George Bennett, and plaintiff was first advised of his rights under said oral joint adventure agreement, notwithstanding the signing of the written agreement; and that plaintiff stands ready to perform said oral agreement of joint adventure and to do equity as a condition to the relief sought under the first paragraph of the prayer; and in the prayer:

> (a) That the court find and decree that the plaintiff and defendant George Bennett entered into the oral agreement of joint adventure above referred to; that the defendants be enjoined from interfering with the plaintiff's right to participate jointly therein; that defendants be required to account to the plaintiff; and that the court find that the written contract was entered into through duress and coercion;

(b) That, in the alternative, plaintiff recover as damages for the wrongful breach of the written contract the sum of $500,000.00.

The Issues Tried and the Decision Thereon.

The defendants filed separate Answers and the issues tried were:

(a) Whether an oral agreement of joint adventure was entered into between the plaintiff and the defendant George Bennett as alleged in the petition; and if so

(b) Whether the plaintiff was wrongfully coerced into entering into the written contract of employment of March 12, 1945; and

(c) If there was no oral agreement of joint adventure or if, one having been entered into, plaintiff was not coerced into entering into the written contract of March 12, 1945; then whether there was a breach of the written contract by the defendant George Bennett, and if so, the amount of damages to be awarded.

This case was tried twice in the court below and the appeal to the Court of Appeals was taken from the judgment entered against the defendants on the oral agreement of joint adventure at the close of the second trial (R. 742).

Prior to the first trial the plaintiff filed a demand for a trial by jury "for all issues herein so triable" (R. 14); and requested the court "to try all issues not triable of right by a jury with an advisory jury" (R. 15).

At both trials the court, over the objections of the defendants (R. 21-25; 122-123), impaneled one jury (1) to act as an advisory jury in respect to questions concerning whether there was an oral agreement of joint adventure as alleged by plaintiff, and whether the plain-

tiff was wrongfully coerced into entering into the written agreement of March 12, 1945; and (2) to act as a common law jury in respect to questions concerning the alleged breach of the written contract of March 12, 1945, and the amount of damages to be awarded, if any, if a breach of said written contract was established. At both trials, at the request of plaintiff and over the objections of the defendants, the jury was instructed in substance that if they found that there was an oral agreement of joint adventure, and that if the plaintiff was wrongfully coerced into entering into the written contract of March 12, 1945, they should so report to the court as an advisory jury and take no further action in the case; but that if they found that there was no oral agreement of joint adventure or that if there was an agreement of joint adventure and if plaintiff was not coerced into entering into the written contract, the jury should then proceed to consider and determine whether there was a breach of the written contract, and if so, the amount of damages to be awarded (R. 53-56; 643-646).

At the first trial the jury acting as an advisory jury in equity found that there was no oral agreement of joint adventure (R. 86), and acting as a common law jury, found that there was a breach of the written contract, and returned its verdict on that issue in favor of the plaintiff and against the defendant George Bennett, and assessed plaintiff's recovery in the sum of $5,000.00 (R. 87).

The court thereafter sustained the plaintiff's motion for a new trial (R. 114), on the ground that the jury having found that there was a breach of the written contract, the amount of the award was inadequate (see Memorandum Opinion of the Court, R. 89-93).

At the second trial, the jury, acting as an advisory jury in equity, found (directly to the contrary of the verdict

of the advisory jury at the first trial) that the plaintiff and the defendant George Bennett had entered into an oral agreement of joint adventure, and that the plaintiff signed the written agreement of March 12, 1945, as the result of coercion and duress, and returned its verdict on the special questions submitted accordingly (R. 687). The jury, acting as an advisory jury in equity, having answered the special questions affirmatively, took no action as a common law jury on the issue concerning whether there was a breach of the written agreement of March 12, 1945 (R. 687-8).

After a hearing (R. 697-783) upon the motion of the defendants to reject the verdict of the advisory jury, and for other relief (R. 690-697), the court, sitting as a court of equity, filed its opinion on December 27, 1948, denying said motion (R. 733-738); and immediately, on the same day, entered its finding of fact and conclusions of law, and rendered its judgment and decree in favor of the plaintiff and against the defendants (R. 738-744).

By its judgment and decree (R. 742-744), the court decreed that plaintiff and defendant George Bennett are joint adventurers each with an equal interest in the garbage collection and disposal contract, and the fruits thereof, between the city of Kansas City, Missouri, and said George Bennett, beginning July 16, 1945, and ending April 30, 1955, and each with an equal interest in all property, real, personal and mixed, acquired in performing said contract or in connection with the operation thereof; and that each is equal in power, right and obligation in the operation and management of the business and in performing and carrying out said contract and in the financial rights and obligations flowing from said relationship.

The court by its judgment made further orders in reference to relief to be granted to plaintiff in the event that

he should be excluded from participating in the operation of the joint adventure; and in reference to the accounting procedure to be followed by the defendants during the life of the contract (R. 742-744).

Outline of Evidence Relating to the Issues Presented and Decided.

The plaintiff's claim of an oral agreement of joint adventure with the defendant George Bennett is based solely upon the plaintiff's testimony, and two letters written by the plaintiff to the defendant George Bennett.

The substance of the plaintiff's testimony in support of his claim of an oral agreement of joint adventure is as follows:

That on November 4, 1944, the plaintiff was introduced to defendant George Bennett by Clyde J. Linde, who had performed some legal services for both the plaintiff and for the defendant George Bennett (R. 155); that during his first conference he outlined to Mr. Bennett the profit possibilities in the performance of a garbage collection and disposal contract with Kansas City, Missouri, and indicated that about 15,000 hogs per year could be fed and fattened on garbage collected in Kansas City; that the performance of a contract for the collection and disposal of garbage would require a capital investment of $160,000.00; and that he proposed that he would advance $10,000.00, that Mr. Bennett should advance $150,000.00, and that he would manage the entire operations in the performance of the contract and receive fifty per cent of the profits (R. 155-159);

That he continued to keep in touch with Mr. Bennett and again called upon him on about November 11, 1944, and again renewed his proposal, at which time he testified that Mr. Bennett said, "That suits me fine," and

said, "I am very happy to have that type of business offered and will hope very much that we can get the contract" (R. 161); that thereafter he continued to contact Mr. Bennett; that Mr. Bennett asked him to write him a letter outlining his proposal and his estimates of cost and operating conditions (R. 162-163); and that he wrote such letter on December 11, 1944 (R. 163).

In this letter (Plaintiff's Exhibit 1, R. 164-168, 173-177), the plaintiff outlined his estimates of the required capital expenditures, of the costs of operation, and of the profit possibilities; and also set forth estimates of the basis upon which the invested capital would be returned over a period of years out of estimated profits, and the basis of the split of the net profits.

The plaintiff further testified that on January 17, 1945, he again wrote the defendant George Bennett a letter with a memorandum (R. 171) outlining various alternative bids which might be submitted (Plaintiff's Exhibit 2, R. 184-187); that he discussed both of said letters with Mr. Bennett (R. 168, 188-189), and that Mr. Bennett did not protest to that part of the letter of January 17, 1945, in which he recited "the fifty-fifty division of the profits" (R. 189);

That early in the year 1945, he reached the conclusion that a capital investment of $160,000.00 would not be adequate for the performance of the garbage collection and disposal contract, and Mr. Bennett stated that he would be able to borrow from his bank the additional capital required and told the plaintiff not to seek additional capital elsewhere (R. 179-180); that plans and specifications for a new garbage collection and disposal contract were issued by the City on February 15, 1945 (R. 170-171), and supplements thereto were issued as late as March 1, 1945 (R. 248; and see R. 408).

The plaintiff introduced in evidence the bid for the collection and disposal of garbage in Kansas City, Missouri, submitted by George Bennett (plaintiff's Exhibit No. 7, R. 353-357); the official contract between the city of Kansas City and Mr. George Bennett, including Notice to Contractors, Contract Document, and Performance Bond in the sum of $50,000.00, executed by George Bennett and by The Western Casualty & Surety Company (plaintiff's Exhibit No. 8, R. 358-413); and also the Ordinance of the City Council approving the contract (plaintiff's Exhibit No. 9, R. 414-415).

The contract for the collection and disposal of garbage is lengthy (R. 358-413) and provides for the work to be performed, the type and amount of equipment to be supplied, and the method of performance in great detail; and reserves very complete powers of supervision by the City authorities.

In respect to his claim that the written contract of March 12, 1945, between plaintiff and George Bennett was entered into as the result of coercion and duress, the plaintiff testified in substance:

That on March 3, 1945, after receiving the final supplement to the City's plans and specifications, Mr. Bennett called him to his office and stated that, "I am not going through with our agreement"; that: "I will give you a proposition that I think will be better for you"; that: "I won't ask you to put any money into the venture"; that: "I will give you a job, and I will give you a lot better job than you have where you are now. I will give you $600.00 a month and ten per cent of the profits"; and that Mr. Bennett further stated that he was going to bid the contract and that if Mr. Mahon did not come in on his proposition, he would be out (R. 181-182);

That he (plaintiff) told Mr. Bennett that his proposition did not interest him, that: "I have spent years get-

ting ready for it and I expect to go through with it the way we have agreed upon it'' (R. 181-182); that he then proceeded to make some investigations to see if anyone might help him in his situation; that he discussed his proposal with others, but it was too late to raise enough money to finance the business or to get anyone else to go in with him, and that he went back to Mr. Bennett several times presenting different propositions but that Mr. Bennett would not increase his offer (R. 182-183);

That on Sunday, March 11, 1945, he discussed the matter with Mr. Linde at his office and told him that Mr. Bennett would not make any change in his offer of $600.00 a month and ten per cent of the profits; that Mr. Linde said he felt the best thing for him to do would be to take Mr. Bennett's offer and get it in writing; that he requested Mr. Linde to draw up a contract, but that Mr. Linde said that he would prefer not to draw up a contract as he was representing Mr. Bennett the same as the plaintiff; but that Mr. Linde finally sketched out on a piece of paper what he thought would cover the conditions Mr. Bennett had offered (R. 182-183).

Plaintiff further testified that he then went to his office in the City Hall and prepared the contract of March 12, 1945, on his own typewriter (R. 195, 245), and went to Mr. Bennett's office in Kansas City, Kansas, on March 12, 1945, at which time the written contract of March 12, 1945, as prepared by plaintiff, was signed (R. 197) by the defendant George Bennett and by plaintiff (plaintiff's Exhibit 4; R. 198-199); that on the same day, the defendant George Bennett submitted his bid to the City authorities and that Mr. Bennett was awarded the contract for the collection and disposal of garbage for the period from July 16, 1945, to April 30, 1955 (R. 199-201, 317, 414-415); that plaintiff resigned his position with

the City, effective March 31, 1945, and began work for George Bennett "under this written agreement" on April 3, 1945 (R. 201); and that he "worked for Mr. Bennett under this written agreement" from April 3, 1945, to August 31, 1945 (R. 203).

The plaintiff further testified that he signed the written agreement of March 12, 1945, under the belief that if he did not sign it he would lose the results of his efforts during the preceding five years (R. 203); that he left the service of Mr. George Bennett on August 31, 1945, and thereafter first consulted lawyers about his controversy with Mr. Bennett in December, 1945, or January, 1946 (R. 203, 204), at which time he discussed the matter with his present counsel, Mr. Paul R. Stinson, and that (R. 204-205):

> "Q. Up to that time had you ever been told by any lawyer that if you were coerced into signing that agreement that you were not bound by it or by anybody else?"
>
> * * * * * * *
>
> "A. I thought that I would have to comply with the conditions of the written contract which we had both signed, and that that would destroy the original contract which I had had with Mr. Bennett."

The defendant George Bennett admitted having discussions with the plaintiff during November, 1944, and subsequent months; and testified in substance that the plaintiff outlined a proposition in which he said he could raise about $10,000.00 if Mr. Bennett would raise $150,000.00, and that they would go into partnership (R. 429-430); that he told the plaintiff he was not interested in that at all, that he had had a partner for 18 or 19 years and did not want any more partners (R. 430); that the fig-

ures contained in the letter of December 11, 1944, did not mean anything because until the specifications were received from Kansas City, Missouri, there was no use talking about the figures in the letter of December 11, 1944 (R. 430-431); that he told the plaintiff that: "So far as I am concerned," * * * "I am just dreaming about the thing until we get the specifications" (R. 431); that the specifications were received about the middle of February, 1945, and that the last addendum to the specifications was received March 3, 1945 (R. 431, 433); that he then called the plaintiff to his office and told him he was ready to talk to him about making him a proposition, and asked him how much he was getting at his present job; that plaintiff told him he was receiving $300.00 a month; that he (Bennett) then told him he would give him $600.00 a month and ten per cent of the net profits in the event that he (Bennett) was awarded the contract; that plaintiff said he was not quite satisfied, that he would like to go into partnership; that he (Bennett) advised him (plaintiff) that "I never did entertain that at all. That was silly in my estimation"; that plaintiff then said he would "think it over" (R. 433).

The defendant George Bennett further testified that he never had made any agreement with plaintiff of any kind as to a partnership, or that plaintiff would be permitted to go into this operation and get fifty per cent of the profits and manage the business and put in $10,000.00; and specifically denied that he ever told plaintiff that he was "kicking him out," or that he was "repudiating" any alleged contract with him (R. 433-434). He further testified that plaintiff later urged him to increase the percentage of profits and finally on March 12, 1945, presented to Mr. Bennett the written contract of March 12, 1945,

which the plaintiff had prepared, and it was signed by both of them (R. 434-435).

The evidence showed that the plaintiff's estimate of the required capital investment of approximately $160,000.00 for the performance of the garbage collection and disposal contract with Kansas City, Missouri, was totally inadequate; that the trucks cost approximately $140,000.00 (R. 504); that the plant site cost $30,000.00; that the improvements in the plant site cost $15,000.00; and that the required number of garbage cans cost $11,000.00 (R. 504); that the approximate average number of hogs purchased for feeding was 4,700 (R. 335), and at the prevailng market prices (R. 521), with an average weight of 160 pounds (R. 335), the initial cost of these hogs would be in excess of $150,000.00; that it became necessary for Mr. Bennett to borrow from the bank for this operation on his own promissory note a total of $265,000.00 (R. 501); and it appeared that he had as high as $328,000.00 invested in the enterprise at one time (R. 517).*

The plaintiff and the defendants, as well as other witnesses, testified at length concerning other issues in the case, including the issues presented upon the plaintiff's claim for damages for the alleged breach of the written contract of employment of March 12, 1945. All of the evidence was incorporated in the record and was before the Court of Appeals upon the appeal from the judgment in favor of the plaintiff upon the oral agreement of joint adventure (R. 742, 754; and see Certificate of Reporter, R. 750-760).

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*The petitioner states in a footnote to his argument in support of the Petition for Writ of Certiorari (p. 21) that the plaintiff's accountant testified that the most money George Bennett had invested in this operation at any one time was $139,500.00; but he admitted on cross-examination that it was necessary to borrow an additional $240,000.00 to carry on the operations (R. 342).

The Decision of the Court of Appeals.

Upon the appeal to the Court of Appeals, the defendants (appellants in the Court of Appeals and respondents here) presented many assignments of error (see defendants' Motion for a New Trial, R. 744-757); but the Court of Appeals found it necessary to decide *only one issue,* to-wit: Whether under the facts and the law the plaintiff had established that the written contract of March 12, 1945, was entered into as the result of coercion and duress.

That this was the only issue actually decided by the Court of Appeals is demonstrated by the following excerpts from the Court's opinion and decision:

> "Among the errors assigned and argued for reversal of the judgment, the appellants contend that the following finding of fact made by the court was clearly erroneous:
>
> > 'Plaintiff Mahon signed the written agreement of March 12, 1945, because he was wrongfully coerced into doing so by the acts and conduct of the defendant George Bennett, in such manner that plaintiff's signature to the agreement was obtained by wrongful coercion and duress and not by the exercise of his own free will.'
>
> "Appellants contend that the finding is not supported by and is contrary to the evidence and requires reversal of the judgment" (R. 767-768).

After reviewing the evidence and applicable authorities the Court of Appeals then decided this issue as follows:

> "We are accordingly convinced that the finding that Mahon was coerced into contracting for employment and that he did not so contract of his own free will was clearly erroneous and must be set aside. The finding is not sustained by substantial evidence.

> *United States* v. *Gypsum Company,* 333 U. S. 364. We conclude that the relationship between Mahon and Bennett in respect of the garbage contract was evidenced and established by the written contract of employment of March 12, 1945, and not by any alleged oral contract'' (R. 779).

While the Court of Appeals reviewed and commented upon the evidence relating to other issues, it did not, as petitioner seems to assume, pass upon or decide the issue of whether the plaintiff had established an oral agreement of joint adventure, or whether the plaintiff's claim for damages for the alleged breach of the written contract of March 12, 1945, is meritorious.

THE QUESTIONS PRESENTED.

Regarding Question A.

In the first question presented by petitioner (Question A, page 4 of Petition), and in the Specifications of Error (Petition, page 5) and the argument (Petition, page 6) which follow, it appears that he seeks to have this Court review a decision which was not made by the Court of Appeals, to-wit: whether under the evidence and the provisions of Rule 52(a) the finding that the plaintiff and the defendant George Bennett entered into an oral agreement of joint adventure is subject to reversal. That question was not decided by the Court of Appeals and it was not necessary for the Court to decide that question, because it held that the written contract of March 12, 1945, was not obtained by duress, and that the written contract is therefore controlling.

If *on the record* the subject matter of petitioner's first question (A) is one which may be presented for the consideration of this Court at all, it should more properly be stated as follows:

A.

Whether the Court of Appeals exceeded its judicial powers under Rule 52(a) of the Federal Rules of Civil Procedure in deciding that the finding of the District Court that the plaintiff was coerced into entering into a written contract was clearly erroneous and must be set aside, because not sustained by substantial evidence (R. 779); it appearing that the decision of the Court of Appeals was based upon an (R. 768) "independent examination of the record, recognizing that we (the Court of Appeals) should sustain the finding unless it was clearly erroneous";

and it further appearing that the Court of Appeals after giving full effect to all of the evidence of the plaintiff on the issue of coercion held that under the Missouri law the facts testified to do not constitute substantial evidence that the written contract was entered into as the result of coercion or duress.

Regarding Question B.

In the second question presented by petitioner (Question B, pages 4-5 of the Petition), and in the Specifications of Error (Petition, page 5) and the argument (Petition, page 32) which follow, the petitioner seeks to have this Court review a question which was not presented for decision to the trial court, nor to the Court of Appeals, and in respect to which counsel for the petitioner throughout the trial and in the Court of Appeals has taken a position diametrically opposite to that now sought to be sustained. Petitioner seems to take the anomalous position that in a case where equitable relief is sought (a) to establish an oral contract and have it enforced, (b) to set aside a written contract on the ground of duress, and (c) to have an injunction and accounting; nevertheless because the petitioner *could have* filed a law action in damages for breach of the oral agreement, and *could have* filed a law action for damages resulting from the exercise of duress, he is now entitled to have the equity action treated as a law action for the purpose of invoking the "right of trial by jury" guaranteed by the Seventh Amendment to the Constitution of the United States "in suits at common law"; and is now entitled to have the verdict of an advisory jury in equity treated as though it were the verdict of a common law jury in a law action.

If *on the record* the subject matter of petitioner's second question (B) is one which may be presented for the

consideration of this Court at all, it should more properly be stated as follows:

B.

Whether the plaintiff has been deprived of his "right of trial by jury" guaranteed by the Seventh Amendment to the Constitution of the United States "in suits at common law," (1) where the issues tendered by the pleadings and the relief sought were cognizable in equity, in that the plaintiff sought (a) to have the Court establish an oral contract, (b) to have the Court set aside an inconsistent written contract on the ground of duress, (c) to have the oral contract enforced by injunction, and (d) for an accounting; (2) where Counsel for the plaintiff and the trial court tried those issues in the District Court as equitable issues in accordance with equity practice; (3) where those issues were again treated as equitable issues by Counsel for the plaintiff in the Court of Appeals, and no contention was there made that said issues should have been tried as at common law by a common law jury, or that the verdict of the advisory jury in equity should be treated as the verdict of a common law jury; and (4) the Court of Appeals in its opinion indicated that review on those issues is governed by the Rules applicable to appeals in equity.

Regarding Question C.

In the third question presented by petitioner (Question C, page 5 of the Petition), and in the Specifications of Error (Petition, page 5) and the argument (Petition, page 35) which follow, the petitioner seeks to have this Court review a question which was not decided by the Court of Appeals, but which was merely commented upon. The Court had before it all of the evidence relating to the plaintiff's claim for damages for the alleged breach of

the written contract of March 12, 1945; and commented upon this evidence, as it had the right to do, in considering whether, in reversing and remanding the case, the case could properly be remanded for further proceedings on the law action.

If *on the record* the subject matter of petitioner's third question (C) is one which may be presented for the consideration of this Court at all, it should more properly be stated as follows:

C.

Whether the plaintiff's cause of action for damages has been prejudged, and the plaintiff deprived of his right to a trial by jury under the Seventh Amendment, and deprived of his property rights without the due process of law accorded to him by the Fifth Amendment to the Constitution of the United States, in an action where (1) the plaintiff seeks equitable relief, or in the alternative that he be allowed to recover damages at law; (2) these alternative actions are tried together before the same jury sitting as an advisory jury in equity upon the equitable issues, and as a common law jury upon the issues as law; (3) judgment is entered in the District Court in favor of the plaintiff upon the equitable issues, and no action taken upon the alternative law action for damages; (4) on appeal to the Court of Appeals the entire evidence upon both issues is before the Court of Appeals; (5) the Court of Appeals reverses the judgment in favor of the plaintiff upon the equitable issues, and (6) in the course of the opinion comments upon (does not decide) the evidence relating to the law action, but specifically states that: "We express no conclusions in respect to that action" (R. 779); and remands the cause with directions to dismiss the equity action and for further proceedings on the law action (R. 779).

ARGUMENT.

It is the contention of respondents that the Petition for Writ of Certiorari herein not only completely fails to present any of the "special and important reasons" as outlined in Paragraph 5(b) of Rule 38 of the Rules of this Court for the granting of the writ, but fails to present any reason whatsoever why this Court, in the exercise of a sound judicial discretion, should grant the writ.

We will discuss the points submitted by the petitioner in the order presented in the Petition and in the supporting brief.

I.

The decision of the Court of Appeals is in conformity with the provisions of Rule 52(a); is not in conflict with controlling decisions of this Court or decisions of other Federal Circuits construing Rule 52(a); and is not in conflict with Missouri contract law on joint adventure and the modern doctrine of coercion.

As heretofore pointed out, the Court of Appeals in its opinion decided only one question, to-wit: that the finding of the trial court that the plaintiff signed the written agreement of March 12, 1945, because wrongfully coerced into doing so by the acts of the defendant George Bennett (R. 767-768), was clearly erroneous and must be set aside; and that the finding is not sustained by substantial evidence (R. 779).

The court reached this conclusion after a complete review of the evidence relating to the issue of coercion and duress, and in so doing did not reject or disregard any of the evidence on behalf of plaintiff upon this issue.

In respect to the evidence relating to this issue, the court stated that "we find no conflict as to any matter of substance" (R. 774). After giving full effect to all of the evidence on this issue, the court held as a matter of law that the facts presented did not constitute evidence of duress or coercion which, under the law of Missouri and elsewhere, would justify the setting aside of a written contract (R. 777).

In considering the evidence relating to this issue, the court gave full and complete recognition to the provisions of Rule 52(a) of the Rules of Civil Procedure. After quoting the finding of the trial court relating to coercion and duress (R. 768), the Court of Appeals said (R. 768):

> "On turning to this question first we note that the court's finding is very general and does not specify any particular 'acts and conduct' of Bennett towards Mahon found to be wrongful or to amount to duress and coercion and deprivation of Mahon's exercise of his free will. There was no general finding that the allegations of the petition were true.
>
> "Accordingly, we have made independent examination of the record, *recognizing that we should sustain the finding unless it was clearly erroneous.*" (Our italics.)

After stating its conclusion that the finding of coercion was clearly erroneous, the Court of Appeals cited the decision of this Court in the case of *United States* v. *Gypsum Company,* 333 U. S. 364; 68 S. Ct. 525, as indicating the principles followed in the application of the provisions of Rule 52(a). In that case, in discussing the proper application of the provisions of Rule 52(a), this Court said (333 U. S. l. c. 395; 68 S. Ct. l. c. 542):

> "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

> on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

In the case at bar, it is submitted that there was in fact *no evidence* to support the finding of duress; since that evidence, viewed most favorably to plaintiff, does not consist of facts sufficient to constitute duress, under the law of Missouri or elsewhere, so as to justify the setting aside of a written contract.

The decision of this Court in the case of *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 S. Ct. 177, cited by petitioner, does not in any way modify the ruling of this Court in the Gypsum Company case, but merely applies the rule to a situation entirely different from that in the case at bar. *See* the recent case of *Orvis* v. *Higgins* (2 Cir.), 180 Fed. 2d 537, for a discussion and analysis of the decision of the *Gypsum Company* case, in the light of the decision in the *Yellow Cab Company* case, in which the Court of Appeals for the Second Circuit stated (180 Fed. 2d, l. c. 539):

> "We think that *United States* v. *Yellow Cab Co.,* 338 U. S. 338, 70 S. Ct. 177, did not modify what was said in the *Gypsum case.*"

In the case of *Chatz* v. *Armour Plant Employees' Credit Union* (7 Cir.), 154 Fed. 2d 236 (certiorari denied, 329 U. S. 728, 67 S. Ct. 83, rehearing denied, 329 U. S. 827, 67 S. Ct. 185), the Court of Appeals for the Seventh Circuit, after referring to the requirments of Rule 52 of the Rules of Civil Procedure (154 Fed. 2d l. c. 239), gave consideration to a finding that a certain agreement had been entered into as the result of duress and the evidence in support thereof. In passing upon this point, the court said (154 Fed. 2d l. c. 240):

> "Construing the testimony most favorably in support of this finding, as we are required to do, we are persuaded that there is no evidentiary support for a finding of duress.
>
> "Equally conclusive on this issue of duress is the failure of plaintiff to seasonably seek avoidance of the agreement because of the alleged duress."

In the case at bar, the plaintiff began work under the written contract of March 12, 1945, early in April, 1945, and worked and received pay thereunder without protest for five months (R. 229), and is still claiming the right to recover damages for the alleged breach thereof.

We submit that, in deciding that the finding of duress was clearly erroneous, the Court of Appeals did not transcend its powers under Rule 52(a), nor is its decision in conflict with controlling decisions of this Court, or with the decisions of other Federal Circuits construing Rule 52(a). On the contrary, the Court of Appeals proceeded in exact conformity with the provisions of Rule 52(a), and the decisions of this Court and of other Federal Circuits in construing said Rule.

The Issue of Joint Adventure.

As already pointed out, the Court of Appeals did not decide the question whether the finding that plaintiff and defendant George Bennett entered into an oral agreement of joint adventure (R. 739) was erroneous. The Court having found that the written contract of March 12, 1945, could not be set aside for duress, it necessarily followed that the written contract is controlling, and it was unnecessary to decide whether or not the alleged prior oral agreement of joint adventure covering the same subject matter was entered into.

The petitioner complains of the comments of the Court of Appeals upon the evidence relating to the alleged oral agreement of joint adventure. These comments are unimportant because that issue was not decided by the Court of Appeals. We submit, however, that the petitioner's criticisms of the comments of the Court of Appeals on the evidence relating to this issue are entirely unjustified.

The petitioner seems to take the position that because there is a conflict in the testimony of Mahon and of Bennett in respect to the alleged agreement of joint adventure, the trial court having had the opportunity to judge of the credibility of the witnesses, the finding of an oral agreement of joint adventure is now unassailable.

This argument overlooks that there are undisputed facts based upon documentary evidence which weigh heavily, if not conclusively, against the plaintiff's claim that an oral agreement of joint adventure was entered into with the defendant George Bennett.

The length and breadth of the scope of the alleged oral agreement of joint adventure claimed by plaintiff to have been entered into is actually embraced in the following vague and sketchy testimony of plaintiff (R. 161):

> "Q. All right. And then did you contact Mr. Bennett some more?
>
> "A. I contacted him again, I think it was on Saturday, the following Saturday. I got through at the City Hall at noon and I went over there Saturday afternoon and I told him that his plan that I not contact anyone else or raise any other funds was satisfactory; that I would take him into the business and that I would be very happy to work it out that way, and that he would put up the $150,000.00, I would put up the $10,000.00; we would split the

profits fifty-fifty and we would amortize our original investments over the years as fast as we could.

"Q. And what did he say to that?

"A. He said, 'That suits me fine.' He said, 'I am very happy to have that type of business offered and will hope very much that we can get the contract.' That is the contract with the City.

Q. Now, approximately when was that, Mr. Mahon?

A. Well, I would say that was November 11th, I would say it was; * * *"

It would require the most cogent, convincing, clear and precise evidence to justify the incomprehensible conclusion that two business men intended to enter into a one-sided contract of joint adventure involving operations and responsibilities of great magnitude extending over a period of years, and requiring the advancement of several hundred thousand dollars by only one of the joint adventurers, without specifying with great particularity the many details relating to the rights and responsibilities of the respective parties.

Admittedly this was not done, and the circumstances are all much more consistent with the position that the discussions were preliminary negotiations only, and did not even approach the dignity of a meeting of the minds upon a final and firm contract of joint adventure involving the expenditure of several hundred thousand dollars, and extending over a period of approximately ten years.

Furthermore, when these discussions took place, it was not known what would be included in the specifications when and if the City asked for bids for the collection and disposal of garbage. When specifications were promulgated about the middle of February, 1945 (with amendments as late as early in March, 1945), then and only

then could Mr. Mahon and Mr. Bennett discuss intelligently any final arrangement to be made between them.

In the contract document relating to the collection and disposal of garbage in Kansas City, and in the specifications, among other things, the requirements in regard to the type and amount of equipment, the number of collections, sanitary requirements and the like are set forth in great detail (R. 368-412), and it was stipulated that:

> The successful bidder (the Contractor) must furnish a Surety Bond in the sum of $50,000.00 (R. 404-407);
>
> All superintendents, foremen and workmen employed by the Contractor must be careful and competent, and subject to dismissal upon demand by the Director of Public Works for incompetency or misconduct (R. 371);
>
> For failure to perform the contract, the city could annul the contract, and without compensation to the Contractor take over the work and equipment and facilities and complete the contract (R. 373-374);
>
> The Contractor was required to give the work his constant attention to facilitate the progress thereof (R. 372);
>
> Neither the Contract, nor any portion thereof, could be sublet without the written consent of the Director of Public Works (R. 375); and
>
> Severe penalties could be imposed for failure to make collection of garbage as required by the contract (R. 387-388).

These and many other provisions of the contract and contract specifications demonstrate that the City would look to the contractor, and to the contractor alone, for the performance of the contract, and that Mr. Bennett very wisely and properly stipulated in the preliminary negotiations that no definite arrangements could be made

with the plaintiff until the specifications were available for examination.

As soon as the specifications were finally available, Mr. Bennett consulted with Mr. Mahon, and made him a proposal, which was in keeping with the requirements of the City's specifications and which resulted in the written contract of March 12, 1945. All discussions prior thereto were preliminary negotiations and were merged into the written contract.

This undisputed documentary evidence is sufficient to destroy the credibility of the plaintiff's testimony that there was an oral agreement for the perfomance of a ten-year contract with the City, the terms of which were not yet known. It was not a question of weighing the plaintiff's testimony against that of George Bennett. It was a question of weighing plaintiff's testimony against documentary evidence which made plaintiff's testimony incredible.

Under well-settled rules it clearly appears that the few general remarks which plaintiff claims were made prior to the execution of the written contract were not such as to establish a meeting of minds upon an oral agreement for the performance of the ten-year city contract under a partnership or joint adventure agreement.

In the case of *Miller* v. *Miller,* 311 Mo. 110, l. c. 124; 277 S. W. 922, l. c. 926, the court said:

> "In *Chapin* v. *Cherry,* 243 Mo. 375, 147 S. W. 1084, a case where two parties plaintiff sought to establish a partnership ownership of a tract of land purchased by and in the name of defendant, this Court discussed the elements of proof necessary to show the existence of a partnership in this wise:
>
> > 'The primary question, therefore, presented for determination is, Did a partnership relation

exist between them at the time the land was purchased by the appellant? If so, it must be because a partnership agreement between them must have been entered into prior to the date of said purchase. That is self-evident, and before there could have been such a contract, the minds of all the parties thereto must have agreed to the same thing, in the same sense and at the same time. This mutual assent of the parties must embrace all the propositions of the parties, and so long as any matter forming an element of the contract is left open, the contract is not complete, and therefore not binding upon any of the parties. The foregoing statement of the law of partnership is announced by all of the authorities, here and elsewhere. *Green* v. *Cole,* 103 Mo. 70 (15 S. W. 317); *Sutter* v. *Raeder,* 149 Mo. 297 (50 S. W. 813). * * * From the earliest days in this state, this Court has been wedded to the doctrine that general remarks occurring in a conversation between two or more parties regarding a business proposition are not sufficient evidence of a partnership agreement. *Price* v. *Edwards,* 11 Mo. 524. The terms, conditions and elements of the proposed co-partnership must be unequivocally and unconditionally agreed to by all the parties thereto, without any variance between the propositions or conditions proposed by any one of them and the acceptance by the others. Or, as was held in the case of *Mackie* v. *Mott,* 146 Mo. 230 (47 S. W. 897), the foundation of a co-partnership is one of intention by all the parties thereto, which must be arrived at from the contract itself, and surrounding circumstances. * * * These are some of the reasons why the law permits every person to select his own partners and never presumes the existence of a co-partnership, but requires those who assert its existence, especially as between themselves, to prove its exist-

> ence, by the clearest and most positive evidence.' "

In *Prasse* v. *Prasse* (Mo. Sup. Ct., not officially reported), 77 S. W. 2d 1001, l. c. 1005, the court said:

> "To the foregoing, we add that, fundamentally, to constitute a partnership, 'there must be such a community of interest as impowers each party to make contracts, incur liabilities, manage the whole business and dispose of the whole property, a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased.' *Musser* v. *Brink,* 68 Mo. 242, 249. And to establish a partnership, its existence must be proved by evidence which is cogent, clear, and convincing, and its terms and conditions must be unequivocally and unconditionally agreed to by the parties. *Chapin* v. *Cherry,* 243 Mo. 375, 147 S. W. 1084; *Medlin* v. *Morris,* 243 Mo. 260, 148 S. W. 85; *Miller, by Hampe* v. *Miller,* 311 Mo. 110, 277 S. W. 922; *Dixon* v. *Dixon* (Mo. Sup.), 181 S. W. 84."

In the case of *Elkhorn-Hazard Coal Co. et al.* v. *Kentucky River Coal Corporation* (6 Cir.), 20 Fed. 2d 67, l. c. 70, the court said:

> "• • • Whether a contract results from an exchange of definite communications, when a formal contract is intended later to be prepared and executed, is a question which has received much consideration. Whether one so results is mainly a question of intention. The law is well stated in *Mississippi & Dominion Steamship Co.* v. *Swift,* 86 Me. 248, 29 A. 1063, 41 Am. St. Rep. 545, 553, as follows:
>
> > 'If the party sought to be charged intended to close a contract prior to the formal signing of a written draft, or if he signified such an in-

tention to the other party, he will be bound by the contract actually made, though the signing of the written draft be omitted. If, on the other hand, such party neither had nor signified such an intention to close the contract until it was fully expressed in a written instrument and attested by signatures, then he will not be bound until the signatures are affixed. The expression of the idea may be attempted in other words: If the written draft is viewed by the parties merely as a convenient memorial, or record of their previous contract, its absence does not affect the binding force of the contract; if, however, it is viewed as the consummation of the negotiation, there is no contract until the written draft is finally signed. In determining which view is entertained in any particular case several circumstances may be helpful, as whether the contract is of that class which are usually found to be in writing; whether it is of such nature as to need a formal writing for its full expression; whether it has few or many details; whether the amount involved is large or small; whether it is a common or unusual contract; whether the negotiations themselves indicate that a written draft is contemplated as a final conclusion of the negotiations. If a written draft is proposed, suggested or referred to, during the negotiations, it is some evidence that the parties intended it to be the final closing of the contract.' "

In connection with the foregoing, it will be recalled that plaintiff's testimony was to the effect that the amounts involved were large, the contract was an unusual one, and the negotiations indicated that a written contract was contemplated as a final conclusion of the negotiations (R. 158-162). Furthermore, the plaintiff's petition alleges that "plaintiff requested and the defendant George Ben-

nett promised the plaintiff that said agreement would be reduced to writing" (R. 3), so that it seems perfectly clear that the parties contemplated that any agreement entered into would be "of such a nature as to need a formal writing for its full expression."

We respectfully submit that the comments of the Court of Appeals upon the evidence relating to the issue of an oral agreement of joint adventure are completely in accord with the requirements of Rule 52(a), and the Missouri Contract Law on joint adventure.

We submit further, however, that since the Court of Appeals did not base its decision on a consideration of this issue, there is no possible basis for the petitioner's request to have that phase of the case reviewed by this Court.

The Issue of Coercion and Duress.

Plaintiff's claim of duress is simply this: that he had an oral agreement of joint adventure with the defendant George Bennett whereby Bennett would submit a bid in his own name for the collection and disposal of garbage in Kansas City, Missouri, if the City advertised for such bids, and if the contract was awarded to Bennett, the plaintiff and the defendant George Bennett would perform the contract as joint adventurers, the plaintiff to contribute $10,000.00 and Bennett to contribute $150,000.00 as capital for carrying out the joint adventure, and the profits to be divided equally; that plaintiff protested; that Bennett offered to enter into a new contract which offer was rejected by plaintiff, and at the same time Bennett stated that he was going to bid on the city contract in his own name; that after eight or nine days, during which time plaintiff negotiated for better terms

under the contract proposed by Bennett and at the same time sought to make arrangements with others to bid against Bennett on the city contract, plaintiff prepared and presented to Bennett the written contract which they both signed (R. 181-183, 195-198).

The plaintiff does not claim that Bennett threatened to refuse to bid on the city contract unless plaintiff agreed to a new contract. On the other hand, the testimony of plaintiff is to the effect that Bennett stated that he was going to bid on the city contract regardless of whether plaintiff did or did not accept his proposition for a new contract (R. 181-182).

It follows, therefore, that plaintiff did not prepare and execute the written contract in order to preserve his rights in the corpus of the alleged oral agreement. The plaintiff knew, as any ordinary business man would have known, that if he had a valid oral agreement with Bennett, and if Bennett broke that agreement, he (plaintiff) would have his remedy. He was an alert business man, holding a public office, and had money and assets of the value of $50,000.00 (R. 324), and was in no way dependent upon employment by Bennett under the written contract as a means of livelihood. He was, in every respect, free to stand upon the alleged oral agreement and to have had his remedy for any breach thereof if he had so chosen.

According to plaintiff's testimony, he fully understood that Bennett's course of action, with respect to the alleged agreement of partnership or joint adventure, would be exactly the same regardless of whether plaintiff accepted or rejected Bennett's offer to employ plaintiff under the terms of the written agreement.

Furthermore, according to plaintiff's testimony, Bennett never at any time demanded that plaintiff accept

the offer of employment, and never demanded that it be accepted or rejected within any fixed time.

If we disregard Bennett's version of this matter entirely, and accept in its entirety the testimony of the plaintiff as set forth in the record, and as stated in his brief in support of his Petition for Writ of Certiorari (pages 22-24), there is presented, as the sole basis for any contention of duress, the alleged claim that Bennett and plaintiff had an oral agreement to perform the city contract (the performance of which was to commence on July 15, 1945), and that on March 3, 1945, Bennett stated to plaintiff that he was not going on with the partnership or joint adventure agreement. The only loss threatened to plaintiff was his anticipated profits under the alleged oral agreement, and for this he had an adequate remedy at law in case he had chosen to stand upon his alleged oral agreement. In this conection, the plaintiff testified that he had investigated Bennett's financial worth, and Mahon makes no claim that he had any fears that Bennett was not financially able to respond in damages for any breach of the alleged oral agreement (R. 160-161).

Upon a review and consideration of all of plaintiff's evidence, the Court of Appeals properly held that under the Missouri law the evidence did not establish coercion or duress or any ground to avoid the written contract of March 12, 1945 (R. 777).

This conclusion is completely supported by the decisions of this Court and of the Supreme Court of Missouri upon this question.

In the case of *Hartsville Oil Mill* v. *United States,* 271 U. S. 43, 46 S. Ct. 389 (cited and quoted from in the case of *McKenzie-Hague Company* v. *Carbide & Carbon Chem-*

icals Corporation, 73 Fed. 2d, 78, l. c. 84, decided October 3, 1934, by the Eighth Circuit Court of Appeals), the Supreme Court said (271 U. S., l. c. 49; 46 S. Ct., l. c. 391):

> "* * * But a threat to break a contract does not in itself constitute duress. Before the coercive effect of the threatened action can be inferred, there must be evidence of some probable consequences of it to person or property for which the remedy afforded by the courts is inadequate."

If, as contended by plaintiff, there was a breach of the alleged oral agreement, he had an adequate remedy at law, but instead of standing upon his rights (if any) under the alleged oral contract, he voluntarily elected (more than four months prior to the time for the commencement of the performance of the city contract under the alleged oral partnership or joint venture agreement) to enter into the written contract of employment, thereby knowingly waiving his rights, if any, under the alleged oral agreement. In this connection plaintiff testified as follows (R. 205):

> "I thought that I would have to comply with the conditions of the written contract which we had both signed, and that that would destroy the original contract which I had had with Mr. Bennett."

A situation somewhat like plaintiff's claim of duress was presented in the case of *Wood* v. *Kansas City Home Telephone Co., et al.,* 223 Mo. 537, 123 S. W. 6 (cited with approval in the case of *Furman* v. *Gulf Insurance Co. of Dallas, Texas, et al.,* 152 Fed. 2d 891, l. c. 894, decided January 10, 1946, by the United States Court of Appeals for the Eighth Circuit).

In a full and able discussion of the law of duress, as applicable to a situation of this kind, Judge Graves (*Wood* v. *Telephone Co., supra,* 223 Mo., l. c. 557-560; 123 S. W., l. c. 12-13) said among other things:

> "That the contract before us is one of three made at the same time, effecting a compromise between the parties heretofore mentioned, is unquestioned. That a contract made by way of compromise may be impeached on the ground of duress we take it to be well settled. In 8 Cyc., at page 523, it is said: 'Duress, if proved, is sufficient to relieve a party from the effect of a compromise which is procured by such means. To establish duress, however, the evidence must show facts reasonably adequate to overcome the will of the party making the compromise.' But what is duress? Some states have statutes giving definitions, but not so in Missouri. With us we must go to the common law, and such modifications thereof as have been made by the courts, if any such have been made. By the common law duress was divided into two classes: (1) Duress by imprisonment; and (2) duress *per minas.* 9 Cyc., p. 444. Of the latter class are such Missouri cases as *Lacks* v. *Bank,* 204 Mo. 455, 102 S. W. 1007, and *Hensinger* v. *Dyer,* 147 Mo. loc. cit. 226, 48 S. W. 912. The class is thus defined by the same authority, at page 445: 'Duress *per minas* arises when a person (1) is threatened with loss of life, (2) is threatened with loss of limb, (3) is threatened with mayhem, or (4) is threatened with imprisonment, and only in these cases at common law.' So, too, says the Kansas Court (*McCormick* v. *Dalton,* 53 Kan., loc. cit. 149, 35 Pac. 1114: 'It is apparent from the evidence given by Dalton upon the trial that the execution of the written contract was not procured by duress. *Cable* v. *Foley,* 45 Minn. 421, 47 N. W. 1136; *Hackley* v. *Headley,* 45 Mich. 569, 8 N. W. 511; *Peckham* v. *Hendren,* 76 Ind. 47; *Emmons* v. *Scudder,* 115 Mass. 367. Duress, in its more extensive

sense, is that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or in apprehension to overcome the mind and will of a person of ordinary firmness. Text-writers divide the subject into "duress *per minas*" and "duress of imprisonment." See *Anderson* v. *Anderson,* 9 Kan. 112; *Helm* v. *Helm,* 11 Kan. 19; *National Bank* v. *Croco,* 46 Kan. 620, 26 Pac. 939.') But in modern practice the courts have gone further, and this later doctrine is thus stated by the same authority (9 Cyc., p. 450): 'The modern doctrine holds that there is no legal standard of resistance which a person acted upon must come up to at his peril of being remediless for a wrong done to him, and no general rule as to the sufficiency of facts to produce duress. The question in each case is: Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purposes of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby constrained? Duress, then, according to this class of cases, includes that condition of mind produced by the wrongful conduct of another, rendering a person incompetent to contract with the exercise of his free will power, whether formerly relievable at law on the ground of duress or in equity on the ground of wrongful compulsion.' As to what will not constitute duress in law, the same authority (9 Cyc., p. 448), says: 'What is not legal duress: Duress by mere advice, direction, influence, and persuasion is not recognized in law. Nor can a charge of legal duress be predicated upon a threat to injure one's credit, to withhold payment of a debt, to refuse performance of a contract, or to foreclose or exercise the power of sale on a mortgage; a threat of arrest or arrest on civil process on a legal claim, when such arrest is allowed by law; or a threat of, or the bringing of a lawsuit or civil process.' Some modern cases recognize the doctrine of threats to destroy property or duress of goods

under oppressive circumstances; but, whatever be the kind of alleged duress, the test of the mental condition is as above stated.

"One of the things in this compromise contract was the fact that Enoch was refusing to carry out his contract of September 28th. 'To refuse performance of a contract' is not duress. In *Tucker* v. *State ex rel.*, 72 Ind., loc. cit. 245, the court says: 'As to the claim of the appellants Thompson and Harris that the bond was executed under duress, it may be said that threats to withhold the payment of a debt, or to refuse the performance of a contract, or to do an injury which may at once be redressed by legal process, are not duress. 6 Wait's Actions & Defenses, p. 658.' In the McCormick case, *supra,* Dalton claimed to have an oral contract with McCormick to construct a mile of railroad grade; that after he began to work he was presented with a written agreement for only one-half mile of the more expensive work at the same price, and, upon his refusal to sign it, McCormick told Dalton's men that he would not further stand for their pay and he (Dalton) could stop work; that Dalton was unable financially to carry on the work unless McCormick paid the men; that under this pressure of losing his contemplated profits, his work already done, and his inability financially to carry on the work, he signed the contract. It was held by Horton, C. J., that the contract was not procured by duress. And Gilfillan, C. J., in *Cabel* v. *Foley,* 45 Minn., loc. cit. 422, 47 N. W. 1136, says: 'That the execution of the contracts was procured by duress would not be established by the evidence offered for that purpose. It amounted to no more than that, plaintiff being without means to pay his men, the defendants refused to pay him what was then due him, unless he executed the contracts. The mere threat to withhold from a party a legal right, which he has an adequate remedy to enforce, is not, in the eye of the law, duress; certainly not such as will avoid the execution of a contract. *Hackley* v.

Headley, 45 Mich. 569, 8 N. W. 511; *Miller* v. *Miller,* 68 Pa. 486.' The Michigan case cited by the Minnesota court is in full accord, and the opinion therein is by the distinguished Justice Cooley, *Goebel* v. *Linn,* 47 Mich. 489, 11 N. W. 284, 41 Am. Rep. 723; *Miller* v. *Miller,* 68 Pa. 486; *Domencio* v. *Alaska Packers' Ass'n* (D. C.), 112 Fed. 554."

and in conclusion with respect to the claim of duress the court said (223 Mo., l. c. 562; 123 S. W., l. c. 14):

"* * * Men of parts, as these defendants are shown to be, did not have their will power so dwarfed by the circumstances as to obviate a solemn contract which was finally drafted by them in the privacy of their own office. They no doubt knew that they had on hand a lawsuit to compel Enoch to comply with his agreement of September 28th, and it may be that they likewise knew that Enoch had at least some defense to that action. They were exceedingly anxious to compromise, and did compromise, and the contract in suit is the result. To our mind the contract, which is one growing out of the tri-party agreement, is not voidable for the alleged ground of duress."

See also:

Morgan v. *Joy,* 121 Mo. 677, 26 S. W. 670.
Tanner v. *West,* 339 Mo. 738, 99 S. W. 2d 7.

We submit that the decision of the Court of Appeals upon the issue of coercion and duress is in complete conformity with the requirements of Rule 52(a), and with the decisions of this Court and the Missouri Supreme Court, relating to this subject, and that the Petition for Writ of Certiorari presents no sound basis for the issuance of the writ.

II.

The petitioner was not deprived of his claimed constitutional right under the Seventh Amendment to a trial by jury of the issues relating to joint adventure and duress.

The question sought to be presented by petitioner in Question B (Petition, pages 4-5), and in the argument in support thereof (Point II, Petition, pages 32-35), was not presented or decided in the trial court, nor was it presented or decided in the Court of Appeals. There is therefore no basis for petitioner's request that this Court review that question.

Petitioner repeatedly asserts in his petition and brief in support thereof that the plaintiff has invoked the Federal Declaratory Judgment Law (Petition, pages 2, 4, 33). This action was first filed in the State Circuit Court and thereafter removed to the Federal Court for diversity of citizenship (R. 1, 11). Obviously, the suit when filed in the state court was not based on the Federal Declaratory Judgment Law. No reference is made to the Federal Declaratory Judgment Law in any of the pleadings, and the significance of the contention that plaintiff invoked the Federal Declaratory Judgment Law is not apparent.

Presumably, the question involved in determining whether, under the Seventh Amendment, the plaintiff, upon timely request, was entitled to a trial by jury of the issues relating to joint adventure and duress, will depend upon whether the action involving these issues was a suit at common law or a suit in equity. Whether the action was under the Federal Declaratory Judgment Law or under general law, it is well settled that if the issues tendered by the pleadings are equitable in their nature and call for equitable relief, the case is one in equity.

Williamson v. *Frazee,* 294 Mo. 320, l. c. 329; 242 S. W. 958, l. c. 961.
Ebbs v. *Neff,* 325 Mo. 1182, l. c. 1191; 30 S. W. 2d 616, l. c. 620.
Stewart et al. v. *Shelton,* 356 Mo. 258, l. c. 263; 201 S. W. 2d 395, l. c. 397.

In the recent case of *Fireman's Insurance Co. of Newark* v. *Smith* (8 Cir.), 180 Fed. 2d 371, inserted on the cover page of petitioner's brief, the court specifically states (l. c. 374):

> "In any case the consideration to be given to the verdict depends upon whether the issues are legal or equitable."

The petitioner in this case (R. 1-7) seeks equitable relief in that he seeks to have an oral agreement established and enforced, to have a written contract set aside for duress, and to have an injunction and an accounting. The plaintiff alleges in his petition (R. 6) that he stands ready "to do equity as a condition to the relief" above referred to.

Plaintiff's counsel treated this branch of the case as an action in equity. At the beginning of the first trial the following colloquy took place between the court and plaintiff's counsel (R. 18-19):

> "The Court: What is he (plaintiff) seeking?
> "Mr. Stinson: He is seeking alternative relief. First, he is asking a finding by the trier of the facts that there was an agreement of joint adventure between Bennett and him under the terms of which they were equal partners in this business.
> "The Court: Yes?
> "Mr. Stinson: And that, second, on this day that the bidding, that is the letting was had, he, Mahon, was forced to sign this written contract, *and the*

equitable relief that is sought under that contract is, first, the finding of the oral agreement; second, the compulsion; and, third, restoration to the rights of a partner in an accounting.

"The alternative plea is that, in the alternative, if the finding is not in his favor on the oral agreement, the compulsion and the accounting, that within a few weeks after he, Mahon, entered upon his job under the terms of the written contract he was wrongfully discharged.

"The Court: And a suit for damages?

"Mr. Stinson: And the prayer for damages is asked." (Italics supplied.)

Plaintiff's counsel requested findings of fact and conclusions of law in accordance with equity practice (R. 738), and among the findings requested by him and given by the court is the following (R. 740):

"5. In his pleading the plaintiff has offered to do equity as a condition to the equitable relief sought herein."

In the Court of Appeals counsel for plaintiff treated this branch of the case as an action in equity. Among other assertions in his brief in the Court of Appeals he states that "The Decree for an Accounting is Sound Equity and a Proper Remedy" (Brief of Appellee filed in Court of Appeals, pages 31, 98).

In these circumstances it is difficult to see on what ground the plaintiff can now contend that he was entitled to a trial by jury as in a suit at common law upon the issues relating to joint adventure and duress.

This question was not presented or decided in the trial court, was not presented or decided in the Court of Appeals, and there is no ruling in respect thereto which could be brought to this Court for review.

III.

The Court of Appeals did not prejudge the plaintiff's claims under the written contract and the plaintiff has been deprived of no constitutional rights in respect thereto.

Here again the petitioner is seeking to bring to this Court for review a question that was not presented for decision nor decided by the Court of Appeals.

At the request of the plaintiff, and over the objections of the defendant, the trial court impaneled one jury (a) to act as an advisory jury in equity in respect to the issues relating to whether there was an oral agreement of joint adventure, and if so, whether the written contract of March 12, 1945, was entered into as the result of duress, and (b) to act as a common law jury in respect to the plaintiff's claim for damages for the alleged breach of the written contract (R. 21-25, 122-123).

Consequently, the evidence relating to all of these issues was presented at one trial before one jury, and was included in the record before the Court of Appeals (see Certifiate of Reporter, R. 759-760).

At the close of the evidence (R. 639), the defendants moved the court to require the plaintiff to elect upon which one of his said alleged causes of action he would proceed, which motion was by the court denied (R. 639). This point was renewed in the defendant's Motion for a New Trial (R. 745, paragraph 6).

In plaintiff's brief filed in the Court of Appeals, in discussing whether plaintiff had made or was required to make an election, counsel for plaintiff stated (Brief for Appellee, page 95):

> "Rather than electing to stand on the written contract, as the record now stands, plaintiff has elected to stand on the joint adventure agreement and to

abandon his claims under the written contract. The jury and the court below having ruled in plaintiff's favor on the joint adventure agreement, plaintiff's claim under the written contract automatically ended. Indeed, his primary relief sought that very thing. He asked to get out of the written agreement and to be restored to his rights under the joint adventure.

* * * * * * *

"The contention that plaintiff has not rescinded the written agreement is equally untenable. *The primary relief sought was itself a disaffirmance of the written contract.* Indeed, the relief granted by the decree had to include the elimination of the written agreement." (Author's italics.)

In these circumstances, after the Court of Appeals decided that the judgment upon the alleged oral agreement should be reversed on the ground that the written contract covering the same subject matter had not been obtained as the result of duress, the court very properly gave consideration to whether in the order reversing and remanding the cause, further proceedings upon the law action based upon the written contract should be allowed. In considering this matter it was entirely within the province of the Court of Appeals to comment upon the evidence relating to the law action. The comments made are all based upon the record evidence. The court made no decision upon the merits of the law action, but specifically stated: "We express no conclusions in respect to that action" (R. 779).

The order of the Court of Appeals that, upon reversal of the judgment based on the equity action, the cause be remanded "for further proceedings on the law action" (R. 780), was favorable to plaintiff, and there is no basis for the contention that the law action has been

prejudged or that the plaintiff has been deprived of any of his constitutional rights in respect thereto.

We respectfully submit that the petitioner has completely failed to present any reason why this Court, in the exercise of a sound judicial discretion, should allow a review of the decision and judgment of the Court of Appeals in this action, and that the writ should therefore be denied.

Respectfully submitted,

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May, 1950.